

COLUMBIA LAW REVIEW

Vol. 78

OCTOBER 1978

No. 6

THE NON-PRECEDENTIAL PRECEDENT—LIMITED PUBLICATION AND NO-CITATION RULES IN THE UNITED STATES COURTS OF APPEALS

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*"I think all I am speaking about is . . . a non-precedential precedent."*¹

INTRODUCTION

In recent years the federal courts of appeals have been beset by a staggering increase in workload.² An oft-told story,³ numerical growth in cases has been accompanied by an increase in the complexity of the tasks that courts have recently undertaken—including supervision of school districts, reapportionment of legislatures, and oversight of prison systems.⁴ This growth, however, has not been matched by a corresponding increment in the number of judges.⁵ Hence, judges have been forced to handle an even heavier workload. To cope with the increase the courts have experimented with a number of techniques such as better internal administration⁶ and reduction

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1. *Hearings Before the Comm'n on Revision of the Federal Court Appellate System* 537 (2d Phase 1974-1975) [hereinafter cited as *Hearings*] (testimony of Judge Robert Sprecher of the United States Court of Appeals for the Seventh Circuit).

2. In fiscal 1965, the federal courts of appeals disposed of 5771 cases; in 1970, 10,699 cases; in 1977, 17,784 cases. [1977] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 164 [hereinafter cited as ANNUAL REPORT].

3. A fair sample of the sources that have told the story includes National Labor Relations Bd. v. Clothing Workers Local 990, 430 F.2d 966 (5th Cir. 1970); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 55 (1975) [hereinafter cited as HRUSKA REPORT]; Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257 and sources cited therein at n.2.

4. See, e.g., Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *Special Project—The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978).

5. In 1965 there were 78 authorized circuit judgeships; by 1970 the number had increased to 97, where it remains at present. [1977] ANNUAL REPORT, *supra* note 2, at 164. A statute to increase substantially the number of federal circuit judgeships has recently been enacted, Pub. L. No. 95-486, 92 Stat. 1629 (1978).

6. A concise summary of some of these efforts can be found in Betten, *Institutional Reform in the Federal Appellate Courts*, 52 IND. L.J. 101 (1976).

in oral argument.⁷ One of the most significant of these efforts has been the attempt to reduce time spent on preparing opinions by limiting the number of decisions that are published and by limiting or forbidding the citation of unpublished opinions. In the last few years all of the federal courts of appeals have promulgated rules or adopted plans to that end. This Article will discuss the history of those rules and will examine closely their content. Finally, it will evaluate arguments relating to the desirability and wisdom of court rules that limit the publication and citation of opinions.

I. HISTORY

Judges, practitioners, and scholars agree that the caseload of the courts of appeals is becoming unmanageable.⁸ Although there may be spirited dispute as to the causes of the overload,⁹ the numbers cannot be challenged: since 1965 the caseload has almost tripled.¹⁰ This growth has raised concerns over the quality of judicial performance. Chief Judge Seitz of the Third Circuit, for example, recently commented:

I hope I am not telling secrets when I say that there was an overwhelming feeling that in deciding, as they do now, some 240 cases a year, they [the circuit judges] were perilously close to compromising the integrity of the decision making process. By this I mean that the judges were concerned whether they had sufficient "thinking" and research time to feel reasonably satisfied with their votes in all the 240 or more appeals on which they sat.¹¹

Dissatisfaction with the volume of published opinions is not a new phenomenon.¹² As early as 1915 a prominent judge observed that the federal

7. For a survey of the proposals to reduce oral argument, see 2 ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975, at 2-32 (1975) [hereinafter cited as APPELLATE JUSTICE: 1975].

8. See Haworth, *supra* note 3, at 257 n.2.

9. For some enlightened speculation on the causes of overload, see Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974).

10. See note 2 *supra*. It should be noted that the number of judgeships has increased over this period by only 25%. See note 5 *supra*. Haworth, *supra* note 3, at 260, estimated that by 1981 the caseload "would require 38 nine-judge courts of appeals, each handling a caseload equal to that now handled by the District of Columbia Circuit." Such a growth in the number of federal appellate courts might alter their character significantly, and perhaps dilute the quality of their work.

11. Remarks by Chief Judge Collins J. Seitz, Third Circuit Judicial Conference (Sept. 22, 1976).

12. For good summaries of the early literature favoring limitations on opinion writing, see Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIB. J. 362 (1974); Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791 (1975).

The earliest efforts to limit publication of judicial opinions in the federal courts of appeals stem from the late 1940's in the Fifth Circuit and the Third Circuit. See O'Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13 (1949); Whitehair, *Opinions of Courts: Fifth Circuit Acts Against Unneeded Publication*, 33 A.B.A. J. 751 (1947); *Opinions of Courts: Should Number Published be Reduced?*, 34 A.B.A. J. 668 (1948) (a report to the

and state courts of last resort had produced over 65,000 opinions, filling 630 volumes, in the five years between 1908 and 1913.¹³ Another writer noted that in the year ending June 30, 1915, 175,000 pages of law reports from the American state and federal systems were added to the library of the Harvard Law School.¹⁴ These figures were alarming at the time, because it was thought that no private lawyer, judge, or law professor could possibly remain current with the avalanche of decisional law. One commentator lamented:

Looking ahead a half century to the time when there shall be two or three times as many inhabitants within our borders and a corresponding increase in our litigation, what are we to expect if the present rate of production of precedents be maintained? The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance, rank upon rank, and tier upon tier, all loaded with their many volumes of precious precedents. One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must needs be supermen indeed.¹⁵

Recognition of the problem led to examination of ways to streamline the appellate process, including consideration of whether the number of opinions published should be reduced. Early commentators suggested that not all decisions merit reasoned opinions and surely not all opinions merit publication. They crystallized their suggestions into proposed sets of standards for determining which cases deserve written opinions and which of those should be published.¹⁶

Limited publication has been considered by the federal judicial establishment since the 1940's.¹⁷ In 1971, the effort began to accelerate; the

eleventh annual Judicial Conference for the Third Circuit of the United States). These efforts were not overwhelmingly successful. See Prince, *Law Books, Unlimited*, 48 A.B.A. J. 134, 136 (1962).

13. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915). While fond of noting statistics and making dire predictions, Judge Winslow maintained a sense of humor. On his opening page, he relates the story of a judge who was drafting an opinion in his chambers "surrounded by a small fortification of law books." An old colleague of his, stopping by to visit the judge and astounded to find him so besieged, produced a remark that is surely the cleverest if not the most genteel dictum to be pronounced on the subject of legal prolixity: "Penney, [the name of the beleaguered judge] I'd rather be a dog and chew rags for a papermill than have your job."

14. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 472-73 (1916). The statistics reported in this Article seem ludicrously small by today's standards. The totals mentioned are almost surely matched today by the output of only two or three large states. See also Prince, *supra* note 12, at 134, for alarming statistics in terms of the number of "miles" of law reports in our large libraries.

15. Winslow, *supra* note 13, at 158.

16. See, e.g., Whitehair, *supra* note 12, at 843; Winslow, *supra* note 13, at 161.

17. Early efforts occurred in the Third and Fifth Circuits. See note 12 *supra* for the relevant sources. The subject was also raised at the 1964 meeting of the Judicial Conference of the United States. The Conference adopted a resolution holding: "That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."

Federal Judicial Center's¹⁸ Annual Report for that year noted a "widespread consensus that too many opinions are being printed or published or otherwise disseminated."¹⁹ There was no agreement, however, on how the problem should be attacked. The report noted that the Center would continue to compile information on the federal and state court approaches to limiting publication.²⁰ These efforts ended in a short report made by the Board of the Federal Judicial Center to the Judicial Conference of the United States,²¹ stating that the needless proliferation of published decisional law had created serious problems. The Board recommended that the Judicial Conference direct each circuit council to review its publication policy and to implement the following modifications:

- a. Opinions will not be published unless ordered by a majority of the panel rendering the decision;
- b. Non-published opinions should not be cited, either in briefs or in court opinions;
- c. When an opinion is not published the public record shall be completed by publishing the judgment of the Court.²²

At its October, 1972, session, the Judicial Conference approved the circulation of the Center's report to all circuit judges and requested that each circuit develop an opinion publication plan.²³

Meanwhile, work on model standards continued at the Judicial Center.²⁴ The Advisory Council for Appellate Justice,²⁵ a distinguished group of law-

[1964] JUDICIAL CONFERENCE OF THE UNITED STATES REP. 11. This resolution did not produce the systematic limited publication plans that are the subject of much of this Article. Some of the circuits had, however, already begun selective publication as part of their screening procedures. The Fourth Circuit took the additional step of urging that unpublished decisions not be cited to the court. See *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091 (4th Cir. 1972). As a result, the Fourth Circuit has been called "the probable mother of the non-publication system." Remarks of John P. Frank, Ninth Circuit Judicial Conference (July 29, 1976).

18. The Federal Judicial Center was established in 1967 by the Federal Judicial Center Act, Pub. L. No. 90-219, 81 Stat. 664 (codified at 28 U.S.C. §§ 620-629 (1976)). The Act specifies four functions of the Center: (1) to research and study the operation of the federal court system; (2) to develop improved techniques of judicial administration; (3) to stimulate, create, and conduct programs of continuing education and training for all personnel of the federal judiciary; and (4) to provide staff, research, and planning assistance to the Judicial Conference of the United States. 28 U.S.C. § 620(b) (1976). A thorough exposition of the Center's genesis and present functions may be found in Clark, *The Federal Judicial Center*, 1974 ARIZ. ST. L.J. 537. The author, Justice Tom C. Clark, served as the first Director of the Center.

19. [1971] FEDERAL JUDICIAL CENTER ANN. REP. 7-8.

20. *Id.*

21. BOARD OF THE FEDERAL JUDICIAL CENTER, RECOMMENDATION AND REPORT TO THE APRIL 1972 SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE PUBLICATION OF COURTS OF APPEALS OPINIONS (1972).

22. *Id.* at 1.

23. [1972] JUDICIAL CONFERENCE OF THE UNITED STATES REP. 33. Originally the plans were to be submitted by January 1, 1973. The deadline was subsequently extended to December 31, 1973. [1973] JUDICIAL CONFERENCE OF THE UNITED STATES REP. 5.

24. [1972] FEDERAL JUDICIAL CENTER ANN. REP. 6.

25. The most succinct explanation for the origin and purpose of the Advisory Council for Appellate Justice appears as a preface to its pamphlet, ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973) [hereinafter cited as STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS]:

The Federal Judicial Center brought together on September 24-25, 1971, a group of distinguished lawyers, law teachers and judges for the purpose of commencing a study

yers, law teachers, and judges, brought together by the Judicial Center, produced a draft report that considered standards for publication, procedures for deciding which opinions should be published, and the desirability of allowing citation of unpublished opinions.²⁶ After further revisions, this report was published in pamphlet form by the Federal Judicial Center under the title *Standards for Publication of Judicial Opinions*.²⁷ The Model Rule²⁸ suggested by the report has been the template for many of the rules subsequently promulgated by the United States courts of appeals.

By its spring 1974 session, the Judicial Conference had received from the circuits the proposed plans it had requested. The report of the Conference reveals its satisfaction with the progress made by the circuits' efforts at

in depth of the appellate systems of the United States, both state and Federal. The work was undertaken in the realization that present-day appellate processes are already under dangerous pressure and that the case-loads to be anticipated in the near future cannot be handled without basic changes in the staffing, structure, organization and work habits of the appellate courts. Those who attended the first conference named themselves the Advisory Council on Appellate Justice and selected as Chairman Maurice Rosenberg, Nash Professor of Law at Columbia University.

Shortly after the Advisory Council on Appellate Justice commenced its work the National Center for State Courts was established. The activities of the Council have been supported for almost two years by grants administered through the State Courts Center. Both Judicial centers have participated in the Council's labor and have received advice from the Council and its members on many occasions. We regard this cooperative effort as a particularly happy example of state-federal teamwork.

26. This report, *Limiting Publication of Judicial Opinions* (1973) was the work of the Committee on Use of Appellate Court Energies, a sub-unit of the Advisory Council for Appellate Justice. The members of the Committee were Harold Leventhal, Carl McGowan, Russell Niles, Walter Schaeffer, Roger Traynor, Bernard E. Witkin, and Charles W. Joiner (Chairman). As far as the authors know, this report is unpublished and unavailable except in the National Archives. It can be found there in the files of the Commission on Revision of the Federal Court Appellate System—Document #454.

27. STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25 (report of Committee on Use of Appellate Court Energies of the Advisory Council for Appellate Justice).

28. The Model Rule provides:

1. Standard for Publication

An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:

- a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
- b. The opinion involves a legal issue of continuing public interest; or
- c. The opinion criticizes existing law; or
- d. The opinion resolves an apparent conflict of authority.

2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

limiting publication. While the proposed plans were not identical, the Conference found their divergence a useful experimental tool in arriving at a settled position on publication.²⁹

At the same time that the Federal Judicial Center and the Judicial Conference of the United States were studying the problem, the Commission on Revision of the Federal Court Appellate System conducted a separate inquiry. The Commission, chaired by Senator Roman Hruska, was composed of members of Congress, judges, teachers, and lawyers. Its congressional mandate³⁰ was, first, to study and report on the present division of the United States into the several judicial circuits and, second, to study and report on the structure and internal procedures of the courts of appeals. As part of the latter endeavor, the Commission considered the question of opinion writing and publication in those courts. The Commission held hearings in 1974 and 1975 and issued its final report in June, 1975. Concerning the problem of limited publication, the commission first recommended that "in every case there be some record, however brief and whatever the form, of the reasoning which impelled the decision."³¹ A majority of the Commission recommended selective publication and the adoption of no-citation rules.³² Ultimately, however, the Commission reserved judgment on those issues and left the problem with the Judicial Conference.³³

The present state of limited publication/no-citation controversy is much as the Judicial Conference left it in 1974. The experimentation continues. The several circuits have devised plans to limit publication that differ not only in their technical particulars but also in their treatment of the basic jurisprudential questions that result from decisions not to publish or permit citation of opinions.

29. The Conference Report noted:

While the plans of each circuit generally follow the basic recommendations of the report of the Federal Judicial Center to the April 1972 meeting of the Judicial Conference, each circuit, to a limited extent, is experimenting with respect to some phases of its plan. There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans.

[1974] JUDICIAL CONFERENCE OF THE UNITED STATES REP. 12.

30. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (current version at 28 U.S.C. § 41 (1976)).

31. HRUSKA REPORT, *supra* note 3, at 50.

32. *Id.* at 51.

33. The Commission concluded:

We have not attempted to exhaust the range of solutions, nor to choose between them. The Judicial Conference of the United States retains a continuing interest in the resolution of these problems; experimentation in the various circuits is continuing; empirical data are being collected; a range of alternatives is being explored. We recognize the Judicial Conference as an appropriate forum and do not believe that it would serve a useful function for the Commission to attempt, by specific recommendation, to foreclose that further study which the problem deserves.

Id. at 52.

II. THE POSITIONS OF THE CIRCUITS

Each circuit has adopted some position on the limited publication/no-citation problem.³⁴ While these positions are not easily categorized, it is possible to identify certain issues in the limited publication debate and to compare the positions of the circuits on those issues. The positions of the circuits on each issue are schematically summarized in Tables I and II at the end of this Article.

A. *Decisions Without Articulated Reasons*

Three circuits permit dispositions with no reasoned opinion at all. The entire decision consists of a single word: "AFFIRMED" or "ENFORCED."³⁵ Rule 21 of the Fifth Circuit, the first circuit to employ this procedure, provides that

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the

34. Pursuant to the request of the Judicial Conference, all of the circuits have filed limited publication plans: some, in addition, have local rules that address the question. A circuit's position on the various issues in the debate can be determined only by looking at both its plan and any relevant local rules. The following are the relevant rules of the several circuits:

District of Columbia	—Rule 8(f), Rule 13(c)
First Circuit	—Rule 14
Second Circuit	—Rule 0.23
Third Circuit	—(Plan only)
Fourth Circuit	—Rule 18
Fifth Circuit	—Rule 21
Sixth Circuit	—Rule 11
Seventh Circuit	—Rule 35
Eighth Circuit	—Rule 14
Ninth Circuit	—Rule 21
Tenth Circuit	—Rule 17

In the Second, Fourth, Seventh, Ninth, and Tenth Circuits, the plan consists simply of the text of the rule. In the Third Circuit, there is no relevant local rule. In the remainder, the publication plan is distinct from the local rules on the question. In two circuits (the First and the Eighth), the publication plans appear as appendices to the circuit's local rules. The publication plans for the remaining circuits can be found in J. SPANIOL, REPORT ON THE OPERATION OF CIRCUIT OPINION PUBLICATION PLANS FOR 1977, app. C [plans hereinafter cited as [Cir. No.] Circuit Plan].

Mr. Spaniol is the Executive Assistant to the Director of the Administrative Office of the Courts. He has prepared similar reports to the Subcommittee on Federal Jurisdiction of the Committee on Court Administration of the Judicial Conference of the United States in 1973, 1974, 1975, and 1977. These reports contain (in addition to the text of each circuit's publication plan) a wealth of information on the operation of the plans. [Each report hereinafter cited as [year] PUBLICATION PLANS REPORT].

35. See 5TH CIR. R. 21, 8TH CIR. R. 14, 10TH CIR. R. 17(b).

following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."³⁶

The rules of the Eighth and Tenth Circuits are substantially the same.³⁷ The Second, Third, and District of Columbia Circuits have slightly different rules which permit disposition by summary order,³⁸ and each of those circuits makes substantial use of the procedure.³⁹ Several other circuits have similar rules but make no extensive use of these procedures.⁴⁰

A key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court's reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators,⁴¹ lawyers,⁴² and judges.⁴³ These criticisms seem

36. 5TH CIR. R. 21.

37. Rule 14 of the Eighth Circuit tracks Fifth Circuit Rule 21 word for word, substituting only the number "14" for "21" in the last sentence. Rule 17(b) of the Tenth Circuit provides as follows:

After argument when the court determines that one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; and (4) that no error of law appears; the court may in its discretion and without written opinion enter either of the following orders: "AFFIRMED. See Rule 17(b)", or "ENFORCED. See Rule 17(b)".

38. D.C. CIR. R. 14(d), for example, reads as follows:

(c) Order form of decision. In accordance with recommendations for improvement of judicial administration, this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency; a judgment, or affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. See Rule 8(f).

See also 2D CIR. R. 0.23; the Third Circuit's manual, INTERNAL OPERATING PROCEDURES 6, 7.

39. In 1977, 20% of the cases, disposed of after hearing a submission by the D.C. Circuit were handled pursuant to rule 13(c). The figure for the Second Circuit is likewise approximately 20%. In the Third Circuit, more than one half of all the cases decided after hearing on submission were disposed of by Judgment Order. See 1977 PUBLICATION PLANS REPORT, *supra* note 34, app. B, at 1-4.

40. The First, Seventh, and Ninth Circuits fall within this category.

1ST. CIR. R. 14 provides in relevant part: "14. *Opinions*. Because of the increase in filings, the court finds itself unable to write opinions, or file opinions, in every case."

7TH CIR. R. 35(c)(2)(ii) provides that unpublished orders "[m]ay contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts. . . ." Ordinarily, the Seventh Circuit does provide adequate written reasons for its orders. *Hearings, supra* note 1, at 471-75 (testimony of Edward H. Hickey, President, Bar Association of the Seventh Federal Circuit).

9TH CIR. R. 21(a) defines an "ORDER" as a disposition of a case without articulated reasons. In the past three years, it has disposed of no cases by order. See 1975, 1976, 1977 PUBLICATION PLANS REPORTS, *supra* note 34, app. B.

41. See Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 134-35 (1977) [hereinafter cited as *Unreported Decisions*]; *Hearings, supra* note 1, at 933 (testimony of Professor Charles R. Haworth); *id.* at 951 (testimony of Professor Paul D. Carrington).

42. *Hearings, supra* note 1, at 555 (1974) (testimony of Willard J. Lassers on Behalf of the American Civil Liberties Union, Illinois Division, and the Chicago Lawyers Committee for Civil Rights Under Law); *id.* at 451-52 (testimony of Edward H. Hickey, President, Bar Association of the Seventh Federal Circuit).

43. *Id.* at 826 (testimony of Judge William E. Doyle of the Tenth Circuit); *id.* at 1107 (testimony of Judge Byron G. Skelton of the Court of Claims). See also HRUSKA REPORT, *supra* note 3, at 49-53.

well founded. First, there is the danger that without the pressure created by a need to expose its reasons to public scrutiny the court will decide a case without reasons or with inadequate ones. This is not to suggest that a court would consciously decide a case arbitrarily, but most who have done legal writing would agree that the process of committing words to paper often tests the structure of the argument and perhaps even the result. Absent the discipline imposed by the requirement that some written record be produced, sloppy logic or first impressions may govern. As Karl Llewellyn observed:

"Affirmed on the authority of *Older v. Younger*" may say the same thing and mean the same thing as "The case *falls within the reason* of *Older v. Younger*. Affirmed." But in from two to six cases out of ten the latter phrasing runs a real chance of inducing a longer and a deeper look at the controlling case, in the way in which controlling cases should be looked at.⁴⁴

Furthermore, a court, if so minded, might use this abbreviated judgment procedure to duck issues, avoid making troublesome decisions, or conceal divisions within the court or the panel.⁴⁵

Even if the court is conscientious and carefully avoids these two difficulties, however, problems with the one word decision remain. Justice must not only be done, it must also appear to be done. A one word disposition leaves the parties and their counsel with no indication of the court's reasoning and, therefore, practically invites the losing litigant to suspect that the court has not adequately considered the case or has reached its judgment through impermissible means. In other words, a court asks too much when it asks that its decision be accepted as the correct result achieved after reasoned deliberation when no reasons at all appear. A final difficulty with the one word decision is that it may leave the Supreme Court with an insufficient record on which to base a decision.⁴⁶

44. K. LLEWELLYN, *THE COMMON LAW TRADITION* 312 (1960).

45. The Fifth Circuit, the principal innovator in the use of the one word disposition, has carefully cautioned against such misuse of its rule 21. See *National Labor Relations Bd. v. Clothing Workers Local 990*, 430 F.2d 966, 972 (5th Cir. 1970).

46. See *Taylor v. McKeithen*, 407 U.S. 191 (1972). In *Taylor*, the district court, with the aid of a special master, ordered the reapportionment of four legislative districts in the New Orleans area. Extensive hearings were held by the master, and the district court made a finding that reapportionment was required, expressly rejecting an alternative proposal of the Louisiana Attorney General. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452, 456 (E.D. La.), modified *sub nom.* *Bussie v. McKeithen*, 457 F.2d 796 (5th Cir. 1971), remanded *sub nom.* *Taylor v. McKeithen*, 407 U.S. 191 (1972). The court of appeals reversed without opinion and adopted the state Attorney General's plan. The Supreme Court remanded, noting that:

An examination of the record in this case suggests that the Court of Appeals may have believed that benign districting by federal judges is itself unconstitutional gerrymandering even where (a) it is employed to overcome the residual effects of past state dilution of Negro voting strength and (b) the only alternative is to leave intact the traditional "safe" white districts. If that were in fact the reasoning of the lower court [the Court of Appeals], then this petition would present an important federal question

Because this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals, we

For these reasons the use of one word dispositions should be abolished. A short statement of reasons may be sufficient in simple, repetitive cases, but some reason should be given in every case.

B. *Criteria for Publication*

The publication plan of each circuit provides standards for determining which opinions should be reported. Some of these guidelines are vague and general. The First Circuit provides the best example of this approach:

Our test, broadly phrased, is whether the district courts, future litigants, or we ourselves would be likely to benefit from the opportunity to read or cite the opinion⁴⁷

The Second,⁴⁸ Third,⁴⁹ Fifth,⁵⁰ and Sixth⁵¹ Circuits have similarly amorphous standards.

The remainder of the circuits have more detailed criteria for publication that are, to a greater or lesser extent, descendants of the *Standards for Publication of Judicial Opinions*, authored by the Advisory Council on Appellate Justice. The *Standards* provide for publication when:

- a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
- b. The opinion involves a legal issue of continuing public interest; or
- c. The opinion criticizes existing law; or
- d. The opinion resolves an apparent conflict of authority.⁵²

The circuits have added several new criteria to the list as suggested by experience and comment. Thus, the District of Columbia Circuit's plan provides for publication of an opinion if it "applies an established rule of law to a factual situation significantly different from that in published cases."⁵³ The rationale for this criterion is clear: the law often progresses as much by applying old rules to new facts as by propounding new rules, and such progress should not be lost by failure to report these decisions. Another addition, which is found in the local rules of the Fourth Circuit, provides for

grant the petition for writ of certiorari, vacate the judgment below, and remand the case to the Court of Appeals for proceedings in conformity with this opinion. 407 U.S. at 193-94 (footnotes omitted, emphasis supplied). It should be noted that *Taylor* represents an unwarranted application of Fifth Circuit Rule 21. *Taylor* involved a reversal of the lower court; rule 21, however, provides only for affirmances without opinion.

47. Plan for the Publication of Opinions, 1ST CIR. R. app. B.

48. 2D CIR. R. 0.23.

49. Third Circuit Plan, *supra* note 34.

50. 5TH CIR. R. 21.

51. Sixth Circuit Plan, *supra* note 34.

52. STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25. Other circuits using this format are the District of Columbia, the Fourth, the Seventh, the Eighth, the Ninth, and the Tenth.

53. District of Columbia Circuit Plan, *supra* note 34, para. e. The Eighth Circuit Plan has a similar provision. See Plan for the Publication of Opinions, 8TH CIR. R. app., para. 4(a).

publication of an opinion if "[i]t is a case in which there is a published opinion below."⁵⁴ The justification for this rule is that a court of appeals may reverse a published lower court opinion or affirm it on different grounds;⁵⁵ if the lower court opinion were published and the court of appeals opinion left unpublished, lawyers could easily be misled. More ambitiously, the Seventh Circuit provides for publication of any of its opinions that "(iv) constitute a significant and non-duplicative contribution to the legal literature (A) by a historical review of law; (B) by describing legislative history; or (C) by resolving or creating a conflict in the law . . ."⁵⁶ Judicial discussions of legislative history and historical reviews of law have value, of course, as aids for further legal development; hence their inclusion in the publication list is warranted. Finally, the Ninth Circuit has a unique resurrection rule providing for publication of an opinion that "calls attention to a rule of law which appears to have been generally overlooked . . ."⁵⁷

If there are to be unpublished opinions,⁵⁸ plans with specific criteria are preferable to broad, generally worded plans. The notion of "an opinion which has precedential value" is too vague to be applied without error, primarily because of the difficulty of appreciating "precedential value" at the time of decision. Under such a standard important cases will go unpublished. If the consumers of the court's product must trust the judges to make correct and consistent decisions in cases that are unreported and thus subject to minimal scrutiny, they should at least be assured that the judges look to standards as definite as possible in determining which cases in fact go unreported.⁵⁹ In sum, efforts to augment the original *Standards for Publication of Judicial Opinions* should be encouraged in order to ensure that significant legal developments are not lost or suppressed.

C. Decision Procedures

In addition to elaborating standards for the publication of opinions, the circuits have tried to establish procedures for deciding whether they have been met. A common approach is to establish a presumption against publication. This presumption sometimes takes the form of a clearly articulated statement. The First Circuit, for example, has noted:

While we do not presently attempt to categorize the criteria which should determine publication, we are confident that a significantly

54. 4TH CIR. R. 18(a)(vi). Other circuits have similar provisions. See Sixth Circuit Plan, *supra* note 34, para. 1; 7TH CIR. R. 35(c)(1)(v); Plan for the Publication of Opinions, 8TH CIR. R. app., para. 4(e); 9TH CIR. R. 21(b)(5).

55. The Seventh Circuit, in contrast, calls for publication only of opinions that "[r]everse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order." 7TH CIR. R. 35(c)(1)(v).

56. 7TH CIR. R. 35(c)(1)(iv). Other circuits have similar provisions: District of Columbia Plan, *supra* note 34, para. d; 4TH CIR. R. 18(a)(iv); Plan for the Publication of Opinions, 8TH CIR. R. app., para. f.

57. 9TH CIR. R. 21(b)(2).

58. See notes 87-181 and accompanying text *infra* for discussion of the advisability of a limited publication regime.

59. A similar conclusion is reached by *Unreported Decisions*, *supra* note 41, at 147.

larger proportion of cases will result in unpublished decisions if the court adopts a policy of self conscious scrutiny of the publish-worthiness of each disposition coupled with a presumption, in the absence of justification, against publication.⁶⁰

Sometimes the presumption is merely an inference drawn from the grammatical form of the standards.⁶¹ Such presumptions are not universal, however, for the publication plans of the District of Columbia, Second, Fifth, Eighth, and Tenth Circuits do not include presumptions against publication. Discontent has been expressed with presumptions of non-publication,⁶² the view being that while the dangers associated with non-publication⁶³ could never be wholly eliminated, they would be diminished if courts were required affirmatively to decide that an opinion does not merit general dissemination.

Separate from the issue of presumptions is the question of how the decision on publication is to be made. The great majority of the circuit plans indicate that the decision is to be made by the majority of the panel that hears the case.⁶⁴ The Fourth Circuit plan provides that a decision to publish may be made by either a majority of the panel or the author.⁶⁵ The Second Circuit requires a unanimous decision by the panel for a case to be disposed of without a published opinion.⁶⁶

Does a dissenting judge have a "right" to publish in majority-rule circuits? Four circuits provide for the right of any judge on the panel to publish a concurring or dissenting opinion in a case, even though the majority opposes publication.⁶⁷ The Ninth Circuit goes further and provides for publication in cases where the majority opinion "[i]s accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers."⁶⁸

Two circuits, the Seventh⁶⁹ and Ninth,⁷⁰ permit some input into the publication decision from outside the court. Seventh Circuit Rule 35(d)(3)

60. Plan for the Publication of Opinions, 1ST CIR. R. app. B. In the Seventh Circuit, the policy statement is also clear. 7TH CIR. R. 35(a) indicates that "[i]t is the policy of this circuit to reduce the proliferation of published opinions." The Third Circuit provides for a presumption against reporting of per curiam opinions, and a presumption in favor of reporting signed opinions. Judgment orders are never reported. Third Circuit Plan, *supra* note 34, para. 1, 4, 5.

61. The Fourth Circuit, for example, before listing its publication standards, provides that "an opinion shall not be published unless it meets one of the following standards for publication . . ." 4TH CIR. R. 18(a). Similar wording is to be found in the plans of the Sixth and Ninth Circuits. See Sixth Circuit Plan, *supra* note 34; 9TH CIR. R. 21(b).

62. See, e.g., *Hearings*, *supra* note 1, at 794-95 (testimony of Professor Martha A. Field).

63. See notes 116-81 and accompanying text *infra*.

64. The circuits which require a decision by the majority of the panel are the District of Columbia, the First, the Third, the Sixth, the Seventh, the Eighth, the Ninth and the Tenth.

65. 4TH CIR. R. 18(b).

66. 2D CIR. R. 0.23.

67. The District of Columbia, the Seventh, the Eighth and the Ninth Circuits have such rules.

68. 9TH CIR. R. 21(b)(6).

69. 7TH CIR. R. 35(d)(3).

70. 9TH CIR. R. 21(f).

provides that: "Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule."⁷¹ The rules of these circuits were clearly intended to decrease the likelihood that an important decision will be lost because it is unreported, since either the public spirit or the self-interest of litigants will encourage them to request the publication of favorable precedents. A difficulty that has been noted, however, is that an outside request rule favors the institutional or habitual litigant. Such a litigant will always request publication of a favorable outcome, because his future chances of success in the court may depend on his ability to rely on that case. His opponent, an occasional litigant, would not have such a powerful incentive. Consider, for example, a typical habitual litigant, the United States Attorney. He might often oppose a private attorney, a small fraction of whose practice is criminal defense work. In such cases, the differential interest in having an opinion published, once the case is decided, is high. The result could well be that the published (precedential) law of the circuit would develop in a lopsided fashion.⁷²

D. Citation and Precedent⁷³

The Circuit court rules forbidding citation of unpublished opinions have caused more controversy than any other facet of the limited publication de-

71. 7TH CIR. R. 35(d)(3). 9TH CIR. R. 21(f) is similar.

72. This argument is made forcefully by Willard J. Lassers, on behalf of the American Civil Liberties Union, Illinois Division, and the Chicago Lawyers' Committee for Civil Rights Under Law, *Hearings, supra* note 1, at 557:

There is another consideration, less subtle. Major litigants are able to request publication of decisions of importance to them. This is not a mere speculative observation. We refer to the case of *Haines v. Otto Kerner, et al.*, 7th Circuit, No. 72-1972. This was a suit regarding prisoners' civil rights where the Court ruled, among other things, that 15 days' solitary confinement was not cruel and unusual punishment and that *Miranda* warnings did not apply to prison disciplinary proceedings. The suit was defended by the Illinois Attorney General. After the case was disposed of by an unpublished order on January 31, 1974, the Attorney General moved that the order be published and it was subsequently published in the *Federal Reporter*, at 492 F.2d 937. Major litigants or attorneys having special interests thus can request publication of opinions favorable to them while not requesting publication of unfavorable decisions. Their opponents, who may be, for example, attorneys in private practice, may have no similar interest in seeing to it that a particular decision was published. Thus the published decisions, the citable decisions, might give an unfair and biased view of the state of the law.

73. The questions of citation and precedent are at least theoretically distinct. A rule that says a prior decision is not a precedent appears to be making an ontological or metaphysical statement about that opinion's place in the legal firmament. A rule that says that a prior decision may not be cited simply says that the opinion may not be used in a particular way. To avoid the metaphysics, the Advisory Council on Appellate Justice recommends that the rules address the matter in terms of citation rather than precedent. STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 20.

bate.⁷⁴ Six circuits forbid citation of unreported dispositions.⁷⁵ Typically, the reasons that the rules give for the prohibition of citation are that (1) unpublished opinions do not fully disclose the court's reasoning, and (2) unpublished opinions are not uniformly available to the parties. Often, however, the rules include exceptions that allow citation of unreported cases for purposes of applying the doctrines of *res judicata* or law of the case. A representative provision is that of the Eighth Circuit: "Unpublished opinions, since they are unreported and not uniformly available to all parties, may not be cited or otherwise used in any proceedings before this or any other court except when the cases are related by virtue of an identity between the parties or the causes of action."⁷⁶

The circuits with no-citation rules have not been reluctant to enforce them. In *United States v. Kinsley*,⁷⁷ the Eighth Circuit rebuked the United States for attempting to cite an unpublished opinion:

The government relies upon our unpublished opinion in *Willie J. Vaughan v. United States of America*, No. 74-1920, filed March 20, 1975. The plan for publication of opinions adopted by this Circuit provides: "Unpublished opinions . . . may not be cited or otherwise used in any proceeding before this or any other court. . . ." We therefore decline to consider *Vaughan* or demonstrate how it is plainly distinguishable from these appeals.⁷⁸

The Sixth Circuit has gone even further; it not only prohibits the citation of unpublished opinions but also regulates their dissemination by any publisher.⁷⁹

Not all the courts prohibit citation of their unpublished opinions. The

74. The question of the constitutionality of no-citation rules has been before the Supreme Court twice. In *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976), the petitioners had attempted to cite an unpublished Seventh Circuit opinion to a Seventh Circuit panel, and the panel struck the citation. The petitioners attacked the circuit's no-citation rule 35 on first amendment and equal protection grounds. The Supreme Court, in a one paragraph opinion, denied a motion for leave to file petitions for writs of mandamus and prohibition.

The Seventh Circuit's no-citation rule was also attacked in *Browder v. Director*, 434 U.S. 257 (1978), *rev'g* 534 F.2d 331 (1976). Certiorari was granted on four questions in *Browder*, one of which challenged rule 35. *Browder v. Director*, 429 U.S. 1072 (1977). The Court's opinion, however, did not mention the no-citation problem.

Do-Right and *Browder* are discussed more completely in *Unreported Decisions*, *supra* note 41, at 142-43.

75. District of Columbia, D.C. CIR. R. 8(f); First, 1ST CIR. R. 14 and Plan for Publication of Opinions, 1ST CIR. R. app. B; Sixth 6TH CIR. R. 11; Seventh, 7TH CIR. R. 35(b)(2)(iv); Eighth, Plan for the Publication of Opinions, 8TH CIR. R. app., para. 3; Ninth, 9TH CIR. R. 21(c).

76. Plan for the Publication of Opinions, 8TH CIR. R. app., para. 3.

77. 518 F.2d 665 (8th Cir. 1975).

78. *Id.* at 670 n.10. See also *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974).

79. 6TH CIR. R. 11 provides:

Unpublished Decisions. Decisions of this court designated as not for publication should never be cited to this court or in any material prepared for this court. No such decision should be published by any publisher unless the rule [rule 11] is quoted at a prominent place on the first page of the decision so published.

The limited publication/no-citation rules have been attacked as curtailing freedom of expression. See note 74 *supra*; note 158 *infra*. If these standard provisions raise first amendment difficulties, a fortiori the Sixth Circuit's rule is objectionable.

Third and Fifth Circuits have no rules at all on the question.⁸⁰ The procedures of the Fourth and Tenth Circuits are sufficiently unusual and sophisticated to warrant special attention. The Fourth Circuit has indicated that in the absence of unusual circumstances it will not cite its own unpublished dispositions.⁸¹ Furthermore, citation of such opinions by counsel is disfavored.⁸² In special circumstances, however, citation is permitted.

If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the disposition in an appendix to the brief.⁸³

The Tenth Circuit does not undertake to refrain from citing its own opinion, nor does it disfavor their citation by attorneys. Its entire statement on the question reads as follows: "Unpublished opinions, although unreported and not uniformly available to all of the parties, can nevertheless be cited, if relevant, in proceedings before this or any other court. Counsel citing same shall serve a copy of the unpublished opinion upon opposing counsel."⁸⁴ The Tenth Circuit has added a fillip to its procedures that does much to counter the argument that citation of unpublished opinions should be prohibited because not all litigants have equal access to them. The court prepares a subject matter index of all its unpublished opinions that is widely circulated. Subscriptions to the index⁸⁵ and copies of unpublished opinions⁸⁶ may be obtained at a minimal cost.

III. THE ARGUMENT FOR THE RULES

The argument in favor of the limited publication and no-citation rules has not been carefully and completely delineated. Commentators have been content to characterize it as an argument based on judicial economy,⁸⁷ although some of its other aspects have also been noted.⁸⁸ Few writers in

80. While the Third Circuit has no rule expressly addressing the question of citation of unpublished opinions, it does set out the preferred form for citation to "federal decisions which have not been formally reported." 3d CIR. R. 21(1)(A)(e)(ii).

81. 4TH CIR. R. 18(d)(i).

82. *Id.* 18(d)(ii).

83. *Id.* 18(d)(iii).

84. 10TH CIR. R. 17(c).

85. Letter from Emory G. Hatcher, Circuit Executive of the Tenth Circuit, to William M. Richman (Aug. 24, 1977).

86. UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, INDEX TO UNPUBLISHED OPINIONS, JANUARY, 1976 THROUGH JUNE, 1976, cover sheet.

87. See *Unreported Decisions*, *supra* note 41, at 142.

88. See, e.g., Seligson & Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37 (1972), in which the authors argue that limited publication also provides economies for the bar and the law librarian; Brief in Opposition for Respondents, *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976), in which it is

this area, however, have paid careful attention to the structure of the argument. The result has been that proponents and opponents of the rules often appear to be speaking and writing at cross purposes; many criticisms, for example, appear to take the form of counterarguments or merely countervailing considerations. When the argument is reduced to its constituent parts, it can be seen that many of these criticisms are really attacks upon its premises.

The structure of the argument favoring the rules is intricate. It consists of two major stages. The first of these is the argument for limited publication; the second, which draws heavily upon the first, is the argument for the prohibition of citation.

A. *The Argument For Limited Publication*

This part of the argument emphasizes the low need for full publication and the high cost of full publication, and presumes the ability of the judges to distinguish those cases that merit published opinions from those that do not.

The first premise of the argument begins by noting that appellate opinions in our judicial system serve two major functions, which Professor Leflar explains succinctly:

Appellate decisions in a common law jurisdiction have two major functions. One is to see to it that the appealed case is decided and, it is hoped, decided correctly. This puts an end to disputes, and achieves the great advantage which the "rule of law" has over private warfare or dictatorial fiat as a means for settling private disputes.

The other principal function of appellate decisions under our system is to establish the law itself, to determine what the content of the law shall be. This is the function of common law precedent, and of the rule of *stare decisis*.⁸⁹

The first function of an appellate decision, which may be called the dispute-settling function, is to dispose of litigation, correct district court and administrative agency errors, and explain the result to the parties and the decisionmaker below. The second function, which may be called the law-making function, is to establish law, explain changes in, and interpretation of, the law to the legal and nonlegal communities, comment upon legal

urged that most of the benefits of limited publication will be lost unless citation of unpublished opinions is prohibited. The most careful exposition of the argument appears in STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25.

89. Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 319 (1971). Judge Shirley Hufstедler of the Ninth Circuit has made the same point. Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971). See also P. KEETON, REPORT TO THE AMERICAN COLLEGE OF TRIAL LAWYERS ON CURTAILING ORAL ARGUMENT, ELIMINATING OPINIONS AND REDUCING THE VOLUME OF PUBLISHED OPINIONS IN THE UNITED STATES COURTS OF APPEALS (1975); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 550 (1969).

and social problems, and criticize existing legal doctrine.⁹⁰ These purposes, it should be noted, closely resemble those that the standards for publication in the circuit rules seek to isolate.⁹¹

The first premise next notes that those opinions serving only the dispute-settling function have value only to the parties in the case and the decision-maker below; they have no value to the legal public at large. Accordingly, since publication of these opinions serves no general purpose, there is no need for full publication.⁹²

The second premise of the argument is that full publication is excessively costly. The costs can be roughly divided between the costs of producing published opinions (judge-time, clerk-time, etc.) and the costs of consuming published opinions (library space, research time, etc.). Because of the increase in the workload of the courts of appeals,⁹³ judicial attention has focused on the costs of production. It is not surprising that when Chief Judge Brown of the Fifth Circuit sought to justify his court's one word disposition of appeals he spoke with "foreboding" of the court's caseload.⁹⁴

To handle this load, time savings must be realized. Because a judge spends a substantial portion of his casetime on opinion writing, as distinguished from research, conference, and argument, reductions in time spent on opinion writing could be significant.⁹⁵ Those savings could result from several factors. First, opinions that serve only the dispute-settling function are by hypothesis of interest only to the litigants and the decisionmaker below. Since they are already familiar with the facts of the case, the appellate judge need not spend as much time carefully organizing and reciting the facts—a task that would have to be accomplished in any published opinion.⁹⁶ Furthermore, in a case in which only the dispute-settling function is being served, the judge need not identify all the issues raised or rehearse all the arguments made by each party. Citation to and discussion of the legal principles that the parties agree are controlling can be curtailed.

90. See STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 2 and 3.

91. See notes 47-58 and accompanying text *supra*.

92. Judge Charles W. Joiner phrased the conclusions as follows:

But unlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law. Even when the focus is confined to appellate courts, it is plain to every lawyer, every judge, and to most law students that many opinions are written that do not merit publication. Often, the matter decided has no potential effect upon our knowledge of the law or its development, yet it results in a written opinion that takes the time and energy the judges could better spend in more attentively considering and developing resolution of significant issues in other cases.

Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195, 195 (1972) (emphasis supplied).

93. See notes 2-4 *supra*.

94. *National Labor Relations Bd. v. Clothing Workers Local 990*, 430 F.2d 966, 968-970 (5th Cir. 1970).

95. Little in the way of empirical observation of a judge's use of his time is available. A study of seven Third Circuit judges found that 48% of "case time" (30% of total "judge time") was spent on opinion writing. *A Summary of the Third Circuit Time Study*, in *APPELLATE JUSTICE: 1975*, *supra* note 7, at 49. The Third Circuit study, however, must be read with a salt shaker handy. Apart from the small number of judges involved, each judge kept track of his own time and defined for himself the terms used in his report.

96. See *Hearings*, *supra* note 1, at 522 (testimony of Judge Robert A. Sprecher of the Seventh Circuit).

In short, the judge need not acquit his legal erudition simply to inform the parties how he arrived at his result.⁹⁷ Finally, a great deal of technical production time is saved by non-publication. Proofreading and cite-checking of galleys, for example, are time consuming tasks which do not even arguably improve the judicial product.⁹⁸

The cost to society of opinion publication extends beyond the burden on the judges, for there are also costs associated with opinion consumption. The most obvious of these is the financial cost of publication and storage of the volumes. Private lawyers, even in large law firms, find it difficult to stock the burgeoning volumes of case law. Public law libraries and the libraries of governmental agencies can accommodate the surfeit, but the expense for the public is large. Less obvious but perhaps more significant is the extra research time that a greater volume of published case law requires. This cost must be borne by the bench as well as the bar. The Advisory Council on Appellate Justice phrased the problem aptly:

The burden on the lawyer is commensurate with that of the judge in terms of accountability in preparing his cases. The endless search for factual analogy requires immense expenditure of time and funds that can result in reliance upon quirks rather than upon careful rationalization and application of the developing law.⁹⁹

A corollary logistical cost arising from the increased number of volumes and the "endless search for factual analogy" is the cost of developing and maintaining increasingly comprehensive and sophisticated law finding devices.¹⁰⁰

Finally, proponents of limited publication fear that full publication will result in a "threat to a cohesive body of law."¹⁰¹ Apparently the fear is that

97. Forceful statements of this particular argument appear in HRUSKA REPORT, *supra* note 3, at 50; STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 18.

98. The argument that reducing the number of published opinions can considerably decrease the amount of time spent on opinion writing and thus increase judicial output has at least some empirical confirmation. Testifying before the Hruska Commission, Judge Sprecher of the Seventh Circuit reported:

For the first eleven months of 1973, the Seventh Circuit published opinions in 223 cases constituting 38% of its appeals determined on the merits and disposed of 367 appeals or 62% by unpublished order. This is undoubtedly the principal reason why in calendar year 1973 the Seventh Circuit for the first time since 1966 terminated more appeals than were filed. The court docketed 1,163 appeals and terminated 1,191 appeals in 1973. Terminations increased by almost 20% in 1973.

He went on to add:

While we are proud that for the first time in seven years we reduced rather than increased our backlog of appeals, we are particularly pleased because we believe that this was accomplished without sacrificing the vital elements of an appeal or disappointing the normal expectations of the bar and public of what constitutes a fair consideration of a case by an appellate tribunal.

Hearings, *supra* note 1, at 521. In addition, since 1973 the percentage of appeals disposed of by the courts of appeals in published opinions has declined by over a fifth—from 48.4% to 37.2%. 1973-77 PUBLICATION PLANS REPORTS, *supra* note 34, at 2.

99. STANDARDS OF PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 7.

100. *Id.* at 8.

101. *Id.* at 6.

as volume increases, so does prolixity and confusion. Central principles may no longer be discernible amidst the crush of decisions.

In sum, the argument for limited publication rules contends that full publication is both wasteful and unnecessary because publication of opinions that serve only the dispute-settling function creates significant extra costs and answers no pressing need. At this point, proponents of limited publication conclude that the plans adopted by the circuit courts are justified. That conclusion, however, is premature. While limited publication may be desirable in some respects, it does not follow that the existing circuit rules are justified. The deficiency in the reasoning comes from ignoring the fact that each rule, in addition to stating the desideratum of limited publication, provides a mechanism for reaching that goal. The judge must decide whether each opinion warrants publication. Though that decision can of course be made at any time, it seems clear that if significant *judicial*¹⁰² cost savings are to be realized, the decision not to publish must be made at or prior to the time writing begins. Thus, in order to reach the conclusion that the rules are justified, an additional or third premise is required. The suppressed premise is that appellate judges, at or before the time of writing, can, and in good faith will, determine whether an opinion will serve the dispute-settling function only or the lawmaking function as well.¹⁰³ It is this suppressed premise (which this Article will address shortly) that is the proper target of much of the criticism directed at the limited publication rules.

B. *The No-citation Argument*

The second major segment of the argument for the circuit rules concerns the prohibition of citation. This segment of the argument consists in turn of two parts: first, the purpose of the limited publication rules would be frustrated if citation of unpublished opinions were permitted; second, citation of unpublished opinions would unfairly advantage certain litigants over others.¹⁰⁴

102. A later decision would still result, however, in cost savings to the *consumers* of the opinions.

103. Some writers have expressly recognized this premise. See, e.g., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 11-12.

104. An additional argument has been made for the no-citation rules. The text does not treat it, because it is essentially a frivolous contention. The argument is that unpublished circuit court opinions should not be cited because it is impossible to "shepardize" them, that is, to determine whether they have been reversed or overruled. See STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 19. The problem of reversal is easily handled. The only judicial bodies that can reverse a court of appeals opinion are that court *en banc* and the Supreme Court. In either case, the reversing court could retroactively order the publication of the reversed opinion; Shepard's Citator would then note the original opinion and its reversal.

The overruling problem is not much more difficult. First, it should be quite unlikely, if judges are selecting for publication with any degree of care, that an unpublished opinion would later be overruled. If it were overruled in a published opinion (all circuit court standards arguably prohibit overruling in an unpublished opinion) Shepard's Citator would pick up the case reference in the published opinion. At that point, Shepard's would simply add to its volumes a very short section on unpublished opinions by circuit. Presumably, the citations to unpublished opinions would be few, the overrulings even fewer; and the extra burden on Shepard's would be small indeed.

It will be recalled that the purpose of the limited publication rules is to lower the costs of producing and consuming judicial opinions.¹⁰⁵ This purpose, it is claimed, would be systematically frustrated by permitting citation of unpublished opinions. For example, one of the principal arguments for the limited publication rules is that judges writing only for the parties and the court below need not fully expound all of the facts and arguments. If citation of unpublished opinions were permitted, however, judges would no longer be satisfied with this limited exposition, fearing that careless words or omitted facts might cause difficulty later on. The savings in judge-time would thus be lost.¹⁰⁶ Judge Sprecher of the Seventh Circuit gave this argument an interesting twist in his testimony before the Hruska Commission.¹⁰⁷ He noted that distinguishing cases and making close factual comparisons are critical for purposes of *stare decisis* but that it is impossible to engage seriously in these endeavors if facts have not been fully and carefully exposed:

Finally, and I think this is really the crux of the question of citation, personally I would think that if a no-citation rule did not go hand in hand with a no publication rule, I would feel that we should do away with the no-publication rule and go back to the old full publication rule, and that is because of the question of *stare decisis*.

I think we would find that our very delicate principles of *stare decisis*, which are the genius of the common law . . . , would break down completely if you would get into the procedure of citing cases that did not fully explore the facts

In other words, the distinguishing of cases is a hallmark of *stare decisis*, and if we were not able to do that, we would find ourselves citing cases that really had no relevance at all¹⁰⁸

Furthermore, permitting citation would diminish the savings in the costs of consuming judicial opinions. Several supporters of the no-citation rule have made the point that if citation were permissible, private publishers would enter the market and systematically publish officially unpublished opinions.¹⁰⁹ Even if private publication did not occur, careful judges and

105. See notes 89-101 and accompanying text *supra*.

106. This argument recurs throughout the literature. See, e.g., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 18. A succinct statement of it appears in Joiner, *supra* note 92, at 199.

107. *Hearings*, *supra* note 1, at 532 (testimony of Judge Robert A. Sprecher of the Seventh Circuit).

108. *Id.*

109. See, e.g., *Hruska Report*, *supra* note 3, at 51:

The Commission is, of course, aware of the problems which result from non-publication. Perhaps the thorniest involves the question whether or not to allow unpublished opinions to be cited as precedent. To allow litigants to cite opinions which the court has designated as "not for publication" invites publication by private publishers, thus defeating the basic purposes of the program.

In his testimony before the Commission, Edward H. Hickey, president of the Bar Association of the Seventh Circuit voiced the same concern:

If unpublished opinions can be cited, publication in some format will surely result. The major publishers of federal court opinions—West Publishing Company, Com-

practitioners¹¹⁰ would feel obliged to monitor and index unpublished opinions, and libraries would inevitably provide shelf space for them. Thus, the substantial savings in the costs of consuming judicial opinions would be lost.

The second no-citation argument is that prohibition of citation is necessary to prevent unfairness. The argument is based on the belief that litigants will have differential access to unpublished opinions.¹¹¹ Permitting citation would unjustly favor those lawyers with sufficient resources to monitor and index unpublished opinions. The small practitioner clearly could not afford that expense. The argument becomes even more persuasive when considering large corporate or institutional litigants—the United States Attorney's Offices, for example. These litigants have large legal staffs and relatively specialized interests and can therefore easily find and catalogue all unpublished opinions of interest to them. A partial solution is found in the rules of the Fourth¹¹² and Tenth Circuits,¹¹³ which permit citation of unpublished opinions if a copy is served on opposing counsel. These rules do not entirely eliminate the problem, however, for the litigant with special knowledge of the unpublished opinions in an area would still be able to use an opinion if it favored him and withhold it if it did not, thereby retaining considerable advantage over his opponent.¹¹⁴

C. *The Schema*¹¹⁵

The argument for the limited publication and no-citation rules is quite complex. The following schema attempts to reduce it to manageable form

merce Clearing House, Prentice-Hall and the Bureau of National Affairs—have thus far refrained from publishing Seventh Circuit's unpublished opinions. All of these publishers have, however, commented that if unpublished opinions become citable, a market for them will develop, and publication will undoubtedly begin, thereby frustrating the purpose of the non-citation rule.

Hearings, *supra* note 1, at 452 (Footnotes omitted). Apparently, there is real cause for concern. In California, which for a time had a limited publication system but did not forbid citation, private publishers did, in fact, offer unpublished opinion services. *Id.* at 476 (letter from Dwight D. Opperman, President of West Publishing Company, to Chief Judge Swygert of the Seventh Circuit).

110. One writer asks the troubling question: "Can a lawyer be criticized for negligence in failing to discover an unpublished opinion which, if known, might have won a case which he lost?" Russell, *Selectivity of Judicial Opinions—by Judge or Official Reporter*, 20 *BROOKLYN BARRISTER* 171, 175 (1969).

111. This argument is probably the most frequently mentioned aspect of the entire limited publication, no-citation debate. The following sources are a representative sample of the debate. *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974); *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972); *STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS*, *supra* note 25, at 19; *HRAUSKA REPORT*, *supra* note 3, at 51; *Hearings*, *supra* note 1, at 487 (testimony of Irvin B. Charne, former President, Bar Association of the Seventh Circuit); Seligson & Warnlof, *supra* note 88, at 52.

112. 4TH CIR. R. 18(d) (iii).

113. 10TH CIR. R. 17(c).

114. See *STANDARDS FOR LIMITING PUBLICATION OF JUDICIAL OPINIONS*, *supra* note 25, at 19; Seligson & Warnlof, *supra* note 88, at 52.

115. We do not wish to suggest that this schema is in the form of a valid natural deduction. It is not. The no-citation argument is not strictly a deduction at all. Rather sections A and B are each short-hand statements of a deduction. We have chosen this form of exposition not because it will satisfy formal logicians, but simply because it is easier to speak about and critique an argument whose parts are somehow denominated.

and thereby provide a framework for assessing criticisms of the limited publication and no-citation rules.

I. THE ARGUMENT FOR LIMITED PUBLICATION

First Premise: Not all appellate opinions need be published.

A. Appellate opinions serve two basic tasks:

1. The dispute-settling function—they decide cases, correct lower courts or agencies, and explain results to the parties.
2. The lawmaking function—they make law and inform the legal consumer.

B. Opinions that perform only the first task have value not to the public at large but only to the parties and the court or agency below.

Second Premise: Publication of all appellate opinions is excessively costly.

A. The Costs of Production

1. The courts of appeals are overcrowded.
2. A significant portion of a judge's time is spent in opinion writing (as opposed to preparation for decision).
3. Limitation of publication to opinions that serve the lawmaking function leads to substantial savings of time and effort:
 - a. It is not necessary to fully recite facts or arguments.
 - b. Prose need not be as polished, nor scholarship as thorough, as in a published opinion.
 - c. Production tasks, e.g., proofreading galleys, are avoided.

B. The Costs of Legal Consumption

The costs of consuming published opinions include:

1. The costs associated with expanding law libraries.
2. The costs of extra research time.
3. The threat posed by prolixity to the cohesiveness of the common law.

Third Premise: Before writing an opinion appellate judges can, and in good faith will, determine whether it will implicate the court's lawmaking function.

Therefore: Limited publication rules are justified.

II. THE ARGUMENTS FOR NO-CITATION

First: Cost savings associated with limited publication would be lost if opinions could be cited.

A. Savings in production costs would vanish; judges would feel bound to draft opinions for a broader audience if they could be cited.

B. Savings in consumption costs would vanish.

1. Private publishers would publish these opinions if a market existed.

2. Even if private publication did not occur, lawyers and judges would feel bound to research unpublished opinions.

Second: Unfairness would result, because unpublished opinions are more available to some litigants than others.

Therefore: Unpublished opinions should not be citable.

IV. THE OTHER SIDE

The argument in favor of the limited publication and no-citation rules is vulnerable to two types of attack. First, although the premises of that argument, if accepted, compel the conclusion that the rules are justified, these premises themselves are subject to challenge. Second, two significant counterarguments can be advanced directly against the rules. Both types of attack will be developed below.

A. *The Attack on Limited Publication Premises*

Premise One: Not All Opinions Need to be Published.

(a) *Two Types of Appellate Opinions.* While the theoretical distinction between the dispute-settling and lawmaking functions is plausible, it is subject to the charge that it is unworkable, that in practice the distinction is too difficult to make. That attack is more appropriately directed to the third premise of the syllogism, however, and will be discussed below.¹¹⁶

(b) *Value to Whom?* The second part of the first premise asserts that opinions serving only to settle disputes have no value to the public at

116. See text accompanying notes 128-41, *infra*.

large. That assertion ignores, however, the value of accumulation of decisions in an area. First, the weight of precedent on a point of law hardens it, making it more difficult to overturn. The sheer number of affirmations allows attorneys to rely on the stability of a doctrine with greater confidence.¹¹⁷ Several cases reaffirming a once controversial point would assure the cautious practitioner where one case would not. Second, later cases help flesh out a precedent, help make it more understandable. These later elaborations are important even though they do not make law, because the sweep of a group of cases makes it easier to understand the principles involved.¹¹⁸ Such fleshing out by application of principle to different facts is vital to common-law adjudication.¹¹⁹ In addition, the accumulation of a large number of routine decisions on a discrete point may suggest to courts, practitioners, or scholars that problems exist in that area, problems that may require doctrinal reform.¹²⁰

Publication of dispute-settling opinions also has value beyond the effect on the quality of precedent, because publication—that is, availability to the public—further an important institutional goal: maintaining the appearance that justice has been done. Publication is a signal to litigants and observers that a court has nothing to hide, that the quality of its work in a case is open for public inspection. At a time when society places an increasingly high value on openness and visibility of decisionmaking,¹²¹ it seems incongruous that non-publication rules should be permitted to obscure the workings of our courts.¹²²

Premise Two: Costs of Full Publication

(a) *Costs of Production.* The first part of Premise Two relies on the heavy caseload of the courts of appeals and the belief that preparation of an opinion for publication involves significantly more judicial resources than does preparation of an unpublished opinion. It is indisputable that the present workload of the courts of appeals creates serious problems. Nor can it be doubted that preparation of an opinion for publication takes time. The Third Circuit time study, for example, found that close to half of a judge's "case time" was devoted to the preparation of opinions.¹²³ Furthermore,

117. For a summary of the effect of precedent on private ordering, see H. HART & A. SACKS, *THE LEGAL PROCESS* 587 (tentative ed. 1958).

118. The rules of several circuits provide for publication when a case involves application of a settled principle to a novel set of facts. See District of Columbia Plan, *supra* note 34, para. e; Plan for the Publication of Opinion, 8TH CIR. R. app., para. 4(c).

119. K. LLEWELLYN, *Afterword to THE BRAMBLE BUSH* 160 (2d ed. 1957), is the classic exposition of the view that a precedent stands only for the proposition that subsequent cases say it stands for ("The Law of Leeways"). See also Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 PITT L. REV. 309, 332-335 [hereinafter cited as *Comment*] for several examples of unpublished opinions in the Seventh Circuit that "flesh out" principles enumerated in published decisions.

120. See text accompanying notes 178-79 *infra*.

121. See, e.g., Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976).

122. This consideration seems all the more pressing with regard to the judiciary—the least visible, least understood branch of our government.

123. See note 95 and accompanying text *supra*.

there is evidence that productivity in courts that have adopted limited publication rules has increased, perhaps significantly.¹²⁴ On the other hand, while the link between limited publication and increased productivity seems intuitively correct, it has yet to be established by careful study.¹²⁵ Since the existence of that correlation would appear to be readily verifiable, it should be empirically established before too much reliance is placed on what is at present an untested hypothesis.

(b) *Consumption Costs.* The second part of Premise Two adduces three costs incurred in the consumption of proliferating caselaw: increased library costs, increased research costs, and diminished cohesiveness of the law. It seems indisputable that opinion proliferation exacts a toll in research time and in library budgets. While new methods to cope with the load have been developed,¹²⁶ their high costs and lag time for implementation make it unlikely that they will significantly alter the picture in the foreseeable future.

The notion that full publication will damage the cohesiveness of the law has intuitive appeal: inability of the bench and bar to deal with "too much" case law will result in an amorphous mass leading to confusion and inconsistency. Central principles will not be readily discernible in this mass and thus will be lost to those seeking to trace the seamless web.

It is difficult to understand, however, how merely cumulative opinions threaten the cohesiveness of the common law; they should, if anything, make research and discernment of principle easier, since there will be more cases elaborating a principle, and some of those cases will be more recent as well.¹²⁷ We suspect that the cohesiveness argument reflects a longing for an earlier, simpler day when an attorney supposedly could practice out of Blackstone and a few volumes of state reports. Such a day—if it ever existed—is long gone; complexity, like inconsistency, will not vanish by sweeping it under the rug.

Premise Three: Early Prediction

The third and generally unarticulated premise of the non-publication argument asserts that judges can, and in good faith will, predict early in the

124. Judge Sprecher testified that following the adoption of the Seventh Circuit's non-publication rule his annual opinion production rose from 45 to 75, *Hearings, supra* note 1, at 534. See also note 98 *supra* for additional evidence that time savings have been recorded after adoption of the limited publication and no-citation rules.

125. See note 95 and accompanying text *supra*.

126. Library storage will be aided by microfilm and, eventually, computer retrieval systems. Research will also be aided by computer systems such as Lexis and Westlaw. See generally Sprowl, *Computer-Assisted Legal Research—An Analysis of Full-Text Document Retrieval Systems, Particularly the Lexis System*, 1976 AM. B. FOUNDATION RESEARCH J. 175; Sprowl, *The Westlaw System—A Different Approach to Computer-Assisted Legal Research*, 16 JURIMETRICS J. 142 (1976).

127. To be sure, more cases will make it harder to Shepardize; again, however, that process will reveal the accumulation of precedent and how recently a given case has been reaffirmed—clearly useful things to know. One problem involving Shepardization that will increase with complete publication is the difficulty of tracing precedent that has been cited needlessly. The useless string citation is a problem quite independent of the publication debate. For a discussion of "strings," see Smith, *The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship*, 1 ARK. L. REV. 89, 96 (1947).

game whether the opinion in a case will merit publication. That the prediction be made before the opinion is written is crucial to the argument; otherwise, little saving of judicial resources will occur.

From the beginning there has been some skepticism concerning judges' ability to distinguish correctly between dispute-settling and lawmaking opinions. Justice Stevens has observed that an opinion's author is uniquely ill-suited to make such a distinction.

[A] rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.¹²⁸

Others testifying before the Hruska Commission had no philosophical dispute with the rules but expressed serious doubts about whether they would work in practice.¹²⁹

A good deal of evidence suggests that these suspicions are well-founded, *i.e.*, that many lawmaking opinions are in fact going unpublished. In the Fourth Circuit, for example, a challenge to Virginia's voter registration laws was disposed of in a one-paragraph unpublished opinion.¹³⁰ An analogous case from the Fifth Circuit has already been mentioned;¹³¹ there the court reversed a district court reapportionment order in a one word opinion. Similarly, when the Seventh Circuit reversed a district court's refusal to order a public mass transit agency to accept advertising messages for a citizens' group, the opinion went unpublished even though it sparked a seventeen page dissent.¹³² And the Ninth Circuit declined to publish a decision that included an important and novel construction of an arbitration clause in a

128. Remarks of Justice Stevens, Illinois State Bar Association's Centennial Dinner, Springfield, Illinois (Jan. 22, 1977), quoted in Brief for Amicus Curiae Chicago Council of Lawyers, Browder v. Director, Dep't of Corrections, 434 U.S. 257 (1978) [hereinafter cited as Amicus Brief].

129. See, e.g., *Hearings, supra* note 1, at 487-88 (testimony of Irvin B. Charne, former President of the Bar Association of the Seventh Circuit); id. at 802 (testimony of Professor Martha Field of the University of Pennsylvania Law School).

130. *Justice v. Mahan*, No. 77-1616 (4th Cir. May 9, 1977).

131. See note 46 *supra* (discussing *Taylor v. McKeithen*, 407 U.S. 191 (1972)).

132. *Impeach Nixon Comm. v. Buck*, 498 F.2d 37 (7th Cir.), *vacated and remanded*, 419 U.S. 891 (1974). Publication came only after reversal and remand by the Supreme Court and after the Seventh Circuit's subsequent remand to the district court, *Impeach Nixon Comm. v. Buck*, 506 F.2d 1405 (7th Cir. 1974) (table). Another example of oversight in the Seventh Circuit is *Bach v. Bensinger*, 504 F.2d 1100 (7th Cir. 1974). *Bach* started life as an unpublished order and was subsequently published upon request by counsel, following the Supreme Court's denial of certiorari, 418 U.S. 910 (1974). *Bach* held that a prisoner is constitutionally entitled to be present during the opening of mail addressed to him. Both of these cases are discussed in Amicus Brief, *supra* note 128.

collective bargaining agreement.¹³³ These cases of suppressed precedent are included by way of example only; they do not exhaust the literature¹³⁴ or the other available data.¹³⁵

The existence of inconsistency between unpublished opinions and published law and among unpublished opinions is also evidence that Premise Three is false.¹³⁶ Opinions that create inconsistencies must be considered lawmaking opinions; by definition, they depart noticeably from the established course of decision. Such opinions should always be published, and as might be expected, every circuit's plan arguably requires their publication.¹³⁷ Yet instances of inconsistency involving unpublished opinions per-

133. *Local 7, Tile Helpers & Finishers v. Clervi Marble Co.*, No. 73-1409, (9th Cir. Nov. 7, 1974), discussed in Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1226 (1975). The arbitration clause included the words "may be submitted to a neutral arbitrator." In light of the fact that the agreement contained a strict no-strike clause, the court held that the quoted language imposed a mandatory duty to arbitrate notwithstanding the use of the precatory word "may."

134. See, e.g., Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B. J. 386 (1973) (numerous illustrations from California). The author found suppressed precedents in several areas: eminent domain, *id.* at 436-41; discovery, *id.* at 440; Uniform Commercial Code, *id.* at 441. See also *Unreported Decisions*, *supra* note 41, at 136-38 discussing an unreported Fourth Circuit decision that gave retroactive effect to *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and describing the treatment of that Fourth Circuit decision in the district courts; Comment, *supra* note 119, at 324-27, 330-32 (discussing several Seventh Circuit cases).

135. We have randomly examined 100 unpublished Fourth Circuit opinions. Several appear to merit publication, i.e., they seem to be opinions fairly characterized as lawmaking. E.g., *United States v. Shaver*, No. 77-1496 (4th Cir. Nov. 2, 1977) (rejecting a motion to disqualify a judge in a bank robbery case on the ground that the judge was a stockholder in a bank); *Harris v. Hartman*, No. 77-1566 (4th Cir. Oct. 31, 1977) (simple negligence resulting in loss of property does not constitute a federal cause of action); *Justice v. Mahan*, No. 77-1616 (4th Cir. May 9, 1977), discussed in text accompanying note 130 *supra*. None of these cases cited controlling Fourth Circuit precedent. The inference is strong that these are thus lawmaking opinions. The alternative hypothesis is that there is relevant Fourth Circuit precedent that the court failed to cite. If that hypothesis is correct, it may be that no "precedents" are being suppressed; but it is fair to conclude that the craftsmanship of unpublished opinions has slipped to unacceptable levels.

In three other cases, the court cited its own earlier unpublished opinions (somewhat odd in light of 4TH CIR. R. 18 (d)(i), see note 81, and accompanying text *supra*): *United States v. Montgomery*, No. 77-1651 (4th Cir., Oct. 20, 1977); *Powell v. Currey*, No. 77-1486 (4th Cir., Oct. 20, 1977); and *Smith v. Davis*, No. 77-1502 (4th Cir., Sept. 15, 1977). The *Smith* opinion, not content with mere citation to an unpublished opinion, reversed and remanded to the trial court, and referred that court to the earlier opinion as an adequate statement of the elements needed to maintain a cause of action! *Id.*, slip op. at 3, n.1.

But cf. Remarks of John P. Frank before the Ninth Circuit Judicial Conference 8-9 (July 29, 1976) (reviewed 50 unpublished Ninth Circuit opinions and found only two with which he was uncomfortable).

136. Much of the attack on Premise Three, relying as it does upon inconsistency and suppressed precedent, is also relevant to the counterarguments. See text accompanying notes 160-70 *infra*. The two phenomena are used, however, for different purposes in the two discussions. Here they are employed to suggest that Premise Three is false. Later, their purpose is to show that the limited publication rules have pernicious consequences that may counter-balance their expediency.

137. Several circuits have standards that specifically require publication of any opinion involving an inconsistency. See District of Columbia Circuit Plan, *supra* note 34; 4TH CIR. R. 18(a)(v); Plan for the Publication of Opinion, 8TH CIR. R. app., para. 4(b); 10TH CIR. R. 17(d)(1). The plans of the remaining circuits all include either (1) a criterion that calls for publication when an opinion establishes a new rule or alters an existing rule or (2) a criterion that calls for publication when an opinion has precedential, institutional, or jurisprudential value. See Table II, page 1208 *infra*. An opinion that is inconsistent with other law, published or unpublished, arguably satisfies these criteria.

sist.¹³⁸ Although there has been no systematic study of the frequency of inconsistency in a large number of unpublished decisions in a single jurisdiction, evidence from the Ninth Circuit¹³⁹ and from the California system¹⁴⁰ does suggest that inconsistency among unpublished opinions is not unusual.¹⁴¹ Each such instance constitutes evidence that judges cannot, at the time of writing, correctly distinguish between lawmaking and dispute-settling opinions, *i.e.*, each instance demonstrates that Premise Three is false.

B. *The Attack on the No-Citation Arguments*

Argument One: Loss of Cost Savings.

The first no-citation argument asserts that the substantial cost savings associated with non-publication—for both judges and legal consumers—would vanish if citation were permitted. This argument seems fairly secure.¹⁴² It should be noted, however, that if judges and attorneys should choose to use unpublished opinions,¹⁴³ even though they cannot be cited, the savings from non-publication will be lessened. Indeed, if enough use is made of those opinions the extra cost of collecting, indexing, and researching them (an “extra” in that cost reductions due to mass distribution cannot be realized) may offset the apparent savings attendant on the non-publication decision.

138. Inconsistency, of course, is no stranger to published opinions. The point here, however, is that inconsistent decisions merit publication. The counterarguments, *see* notes 160-64 and accompanying text *infra*, examine whether non-publication helps cause inconsistency.

139. *See* Remarks of John P. Frank, *supra* note 135, at 11-12; Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1224 (1975) (conflict between published and unpublished opinions involving application of a statutory penalty for improper withholding of a deduction from a seaman's wage not expressly permitted by law.); Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U.S.F.L. Rev. 219, 253-54 (1974) (discussion of conflict between published and unpublished opinions on the question of the weight given previous arrests).

There is some evidence of inconsistency from the Third Circuit as well. *See* Krolick Contracting Corp. v. Benefits Rev. Bd., 558 F.2d 685, 689 (3d Cir. 1977), in which the court indicated that an unpublished opinion was flatly inconsistent with prior published law.

140. Kanner, *supra* note 134, discusses a number of inconsistencies among decisions of the California Court of Appeals. His list includes eminent domain cases, *id.* at 436; interpretation of public contracts (is it an issue of law?), *id.* at 442; and discovery procedures, *id.* at 440.

141. It should not be surprising that few writers have collected examples of inconsistency or suppressed precedent. Production of such evidence requires, first, access to unpublished opinions and, second, sufficiently detailed knowledge of the law of the jurisdiction (published and unpublished) to determine whether an opinion is remarkable in virtue of its novelty or its conflict with other case law. Often, only the genuine expert can locate such evidence. *See* Kanner, *supra* note 134, at 436. Finally, detection of inconsistency or suppressed precedent might require examination of the briefs and record in the case, because the brevity of an unpublished opinion could obscure its rationale.

In light of these difficulties, one thorough effort deserves mention. A Comment in the *University of Pittsburgh Law Review* reports the results of an examination of the unpublished orders of the Seventh Circuit Court of Appeals. Of the 150 unreported orders issued in that period, 15% were found that should have been published, *i.e.*, 15% of the Seventh Circuit's orders were believed to be instances of suppressed precedent. *See* Comment, *supra* note 119. This is the sort of careful effort that will ultimately determine whether suppressed precedent and inconsistency are statistically significant phenomena.

142. *See, e.g.*, Letter from Dwight D. Opperman, President of the West Publishing Company, to Chief Judge Swygert of the Seventh Circuit, *reprinted in Hearings, supra* note 1, at 476: “In the absence of such a [no-citation] rule . . . , somebody will end up publishing them.” Unpublished opinions of course often find their way into “specialized reporters.”

143. *See* text accompanying notes 149-57 *infra*.

Argument Two: Resulting Unfairness. The second no-citation argument is rooted in the concept of fairness: to permit citation of unpublished opinions would result in prejudice to those litigants who do not have ready access to them; therefore, citation must be limited. There are two responses to the unfairness argument, responses with significantly different implications for the non-publication argument.

(a) *Unequal Access is Not Unfair.* Courts often use materials that are not widely available. The legislative history of statutes and administrative regulations, for example, can be quite difficult to track down, especially in geographic areas where depository libraries are scarce. Yet courts freely use legislative history¹⁴⁴—examining such relatively unavailable sources as committee reports, conference reports, and superseded agency regulations—with only an occasional voice raised in protest.¹⁴⁵ Other examples of limited access research and law-finding tools can be enumerated. Special interest law reporters,¹⁴⁶ too expensive for small practitioners or even small bar libraries, may provide invaluable aid in gathering and organizing unreported district court opinions¹⁴⁷ and the work of administrative agencies. In addition, well-heeled litigators¹⁴⁸ have access to even more sophisticated research tools, including computerized retrieval systems, that most cannot afford. These examples suggest that concern over limited access to unpublished opinions may be overstated. If permitting citation of unpublished opinions is unfair, it is not significantly more unfair than other well-established practices.

(b) *Unfairness is an Unavoidable Result of Limited Publication.* Even if it be ultimately determined that unequal access to governing decisional law cannot be tolerated, it is nevertheless far from clear that no-citation rules remedy the problem.¹⁴⁹ Such rules restrict but do not eliminate effective use of unpublished opinions. Compilations of those opinions will still be made by institutional litigants, such as United States Attorneys or Public Defenders, and by wealthy private litigants. They will do so, because those with

144. Among the more famous uses of legislative history in the Supreme Court are *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

145. Justice Jackson, concurring in *United States v. Public Utils. Comm'n*, 345 U.S. 295, 319 (1953), made this point with some vigor.

146. Federal taxation law, with its own reporters and citators and its reliance on materials not generally available (revenue rulings and legislative history), for example, surely provides the best illustration. But the problem exists in all fields, even those in which the litigants might not be as wealthy as many of the litigants in the tax field. Public interest and environmental lawyers, for example, rely on specialized services.

147. Indeed, the separate problem of use of unreported district court opinions is never discussed. We believe them to be influential, not just with the judge who authored them but throughout the district as well.

148. One such litigator, Francis R. Kirkham, a member of the Hruska Commission, remarked during that Commission's hearings that he was "terrified in [his] practice of law because [he] cannot move without a computer. . . ." *Hearings, supra* note 1, at 612.

149. The argument here is basically an argument by dilemma. Proponents of the no-citation rules must either admit that unequal access is not unfair, in which case there is no need for the rules, or contend that unequal access is unfair, in which case the rules do not provide a sufficient remedy.

access to unreported decisions will enjoy a considerable advantage over their opponents, even in the face of a strictly enforced no-citation rule.¹⁵⁰

Several factors contribute to this advantage. The first involves planning. When making decisions about initiating litigation, settling claims, or appealing unfavorable results, an attorney could profit greatly from reading all that a court has produced in a single area. Even if no lawmaking opinions were to slip through the court's screening process, the sheer number and recentness of opinions that serve only the dispute-settling function would be relevant to those decisions. If, on the other hand, a significant number of lawmaking opinions go unpublished, the advantages to the sophisticated litigant are even more pronounced. Without citing the relevant unpublished opinion, an attorney aware of such an opinion could use its arguments, exact language, and hypotheticals. He would know which of the court's published opinions were considered relevant by its citations. Finally, if inconsistency exists between a court's published and unpublished work, it would be of great practical value to know what the court *does* as well as what it *says*. In sum, the unequal access argument can be turned on its head. Pursued to its logical conclusion it is not an argument *for* no-citation rules but rather a powerful argument *against* the whole notion of limited publication.

A little reflection on the use of unreported decisions by the judiciary itself reinforces this point. First of all, district court judges receive and read the unpublished decisions.¹⁵¹ When faced with a case similar to an unreported decision he has recently read, the careful judge will surely consider, but not cite, the opinion. He will do this because he *knows* the "law" of his circuit and feels bound to follow it.¹⁵² His years of common-law training in the force of *stare decisis* are not so easily swept aside by a new local rule. The interaction between knowledgeable counsel and judge when an important unpublished decision comes up must present a strange spectacle as they attempt to discuss (in the manner of not discussing) the forbidden fruit.

150. This argument was made quite forcefully by Willard J. Lassers in his testimony before the Hruska Commission. See *Hearings*, *supra* note 1, at 557. See also Amicus Brief, *supra* note 128, at 16-17; Kanner, *supra* note 134, at 390.

The proponents of the no-citation rule have not been naive about this problem; indeed, it was anticipated in STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS, *supra* note 25, at 19: Nothing proposed in this report will overcome the discrepancy that exists today and will continue to exist between lawyers continually litigating specific types of matters before a court, and the lawyer who only occasionally appears on such matters. The first lawyer may have a better idea as to the way the judges think and the likelihood of success. We believe this proposal does not accentuate this problem and perhaps minimizes it by preventing the knowledgeable lawyer from citing the unpublished opinions to the court.

See text following note 157 *infra* for a counterargument to the last sentence quoted.

151. Some circuits, *e.g.*, the Fourth and the Ninth, circulate all of their unpublished opinions to all circuit and district judges in their circuit as a matter of course; others, *e.g.*, the Seventh, apparently circulate the unpublished opinions only to the circuit judges in their circuit and the district judge below; still others, *e.g.*, the First and the Sixth circulate some but not all of their unpublished opinions to all circuit and district judges in their circuit. The source of this information is personal letters from the clerks, circuit executives, and chief judges of the several circuits to the authors.

152. Or he may follow the non-publication decision due to a dislike of being reversed. The effect is the same.

On occasion, an especially frank district judge has denied himself the pleasures of the game and admitted indulgence.¹⁵³

Similarly, the circuit courts know how they have disposed of cases in the past.¹⁵⁴ If Karl Llewellyn was right in his suggestion that following precedent is a basic human urge,¹⁵⁵ then it is natural that the court will attempt to follow its earlier decisions—at the very least, for the sake of consistency and collegial harmony. Judge Sprecher in his testimony before the Hruska Commission revealed inadvertently that judges do feel the need to use their unpublished works:

It worries me, too, because what we are going to have to do now, I think, and this is probably the next step, we are going to have to have some kind of an intracourt index of unpublished opinions, indexed according to the subject matter and so forth. These matters are going to have to be available for the court, even though they cannot be cited by the court or to the court.

I see nothing underhanded about something like that. It just means that internally we will be consistent and that different panels of the court in unpublished orders are not coming out with different results at the same time, or even at different times.

To me, the biggest argument against the people who say citation should be allowed is to permit the court to have full availability and use of its opinions for its own intra-court procedures, but without citing them to the outside world because they are not prece-

153. See, e.g., *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975), *rev'd on other grounds*, 538 F.2d 1037 (4th Cir. 1976):

Although the Court is mindful of the Fourth Circuit's admonition that memorandum decisions are not to be accorded precedential value, . . . the legal trend evinced by these four memorandum decisions, with all seven active judges participating in one or more of them, leads the Court to the conclusion that it is now the law in this circuit that an individual convicted of a crime has a constitutional entitlement to pre-conviction confinement sentence credit, whether indigent or not.

Durkin relied on *Mohr v. Jordan*, 370 F. Supp. 1149 (D. Md. 1974), where the court had used the same reasoning to reach the same result. Despite the *Mohr* court's express reliance on three unpublished decisions (indicating a need for published law on the question), the Fourth Circuit *did* not publish its affirmance of the decision. *Mohr v. Jordan*, No. 74-1496 (4th Cir. June 10, 1974). The Fourth Circuit, on appeal in *Durkin*, agreed with the lower court's disposition of the substantive issues. Sticking by its guns, it did not cite its own unpublished work; it did, however, cite *Mohr*, a district court decision based on unpublished Fourth Circuit decisions. Thus, the circle was completed.

154. At the very least, the individual members of the panel will know.

155. See Llewellyn, *Case Law*, in 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 249 (1930). A witness before the Hruska Commission, Professor Terrence Sandalow, pointed to an analogous situation:

I confess I just have not given enough thought to the problem of publication of opinions. It does seem to me that the difficulties that are pointed to in the Commission's report of how you handle unpublished opinions are very large difficulties indeed. Do you prohibit counsel from thinking about these, from taking them into account, from citing them to the court?

We have studies of arbitrators which indicate that even though they are in a process which theoretically forbids consideration of precedent, it is nonetheless an important factor in their judgment, and I do not see how the courts would be able to avoid a similar process of decision, and that means that knowledgeable lawyers will begin to argue these unreported or unpublished opinions.

Hearings, supra note 1, at 748.

dential. It is just a matter of consistency so that there are no aberrations.¹⁵⁶

It is apparent, then, that a no-citation rule will not prevent some uses of unreported opinions by bench and bar; it will not, in other words, remedy

156. *Hearings, supra* note 1, at 536. The judges appear to be caught in a serious dilemma here. If they pay no attention to their unpublished decisions they risk inconsistency; if they consult those opinions, they appear to be using them as precedent. The depth of the problem is revealed by the following interchange, which, though lengthy, merits quotation in full:

MR. KIRKHAM: Your remark of a moment ago disturbs me a little, looking at it from the standpoint of the lawyer instead of the bench. You say you would like to keep a record of these in order that the court can refer to its prior opinions.

JUDGE SPRECHER: Yes.

MR. KIRKHAM: In other words, you are simply saying that they are going to be precedential but that we are not going to have the advantage of them.

Do you think that the possibility that there should be some conflict within the circuit in cases of this type is sufficient to have you keep a file of those things and look at them when I do not have a chance to look at them?

JUDGE SPRECHER: I think we are zeroing in, now, on the heart of it. I am not sure I can answer your question.

MR. KIRKHAM: Well, you have to go all one way or the other, don't you?

JUDGE SPRECHER: It seems simple to say that there shall be no citation. That is a simple rule, but your what —

MR. KIRKHAM: It is simple, it is direct, it is good, and it contributes. You have convinced me, particularly with your statement about the effect of stare decisis in our law, in building a structure out of solid bricks, but now you are going to take a broken brick and hold it back on me.

JUDGE SPRECHER: No. I am not going to say that the judges, by indexing their own opinions, should use them as precedents. All I am saying is: let's use them for what they obviously are on their face.

MR. KIRKHAM: Let's use them as precedents as non-precedents.

JUDGE SPRECHER: No.

MR. KIRKHAM: I think you have to think of that again.

JUDGE SPRECHER: Not exactly that, either. For example, let's say that there is a statement of law citing a string of cases, the way the District of Columbia sometimes does. It would certainly save a lot of time if the judge could go back and look at that same string of cases.

It has nothing to do with how the facts were handled or how the case was actually decided. It is just a method of having a place to look for sources of any help you can get in building your opinion and saving judge time for the future.

MR. KIRKHAM: I guess if you want to make a memorandum of your index of your law clerk's memos or an index of the briefs, that is one thing, but it bothers me a great deal for you to say that you are going to make an index of your unpublished decisions and use them to aid you in your decision in the cases, but not have them available to me.

JUDGE SPRECHER: I think all I am speaking about is—I am talking about a non-precedential precedent, because I am talking about aids to future production of opinions and not their use as precedents in the stare decisis sense.

PROFESSOR LEVIN: Do I understand, Judge Sprecher, that you would not use this index to avoid inconsistency in the court's decisions, then?

JUDGE SPRECHER: I would think not. Obviously, it would make no sense whatsoever to say that a new case has to come out the same way this one does, because we do not know what the facts of this other one are anyhow, so that is right.

I think the answer to your question, Professor, is that inconsistency would only be in the sense that if I say that *United States v. Gore* stands for something, I don't want to say in another case that it stands for something else.

Obviously, that is a ridiculous example, but I am thinking particularly in terms of just the locating of citations, and so forth, for the purpose of further research, rather than any type of precedential value at all because, Mr. Kirkham, I want to stay as far away from that as you do.

DEAN CRAMTON: It does seem to me that you are caught in a dilemma here. I thought you were searching for a while for saying yes, you are concerned about consistency, and you responded to Judge Robb that way, yes, it did bother you that one panel might decide even in a non-precedential case one way and then another panel would decide a case on all fours with it a different way—

the unequal access problem, a problem inherent in any limited publication scheme.¹⁵⁷ What the no-citation rule will do is preclude counsel and the court from openly discussing unpublished opinions. The courts' reference to such opinions will be sporadic and unpredictable, depending upon the individual judge's memory and the ability of counsel to draw the court's attention to a case without citing it. The merits of the adversarial system will be lost in this situation.

Paradoxically, the no-citation rule may work to increase rather than decrease the unfairness to the uninitiated lawyer. If knowledgeable counsel cites an unpublished opinion to the court, his opponent is put on notice of the existence of that opinion and perhaps of others. He can acquire a copy and respond to any argument concerning it. If, on the other hand, the sophisticated attorney uses arguments or language drawn from the unreported case without citing it, his uninitiated opponent is unlikely to learn of its existence. A dialogue of sorts is going on between the knowledgeable attorney and the court, with the opponent unable to participate. The latter may indeed spend some time wondering why certain "magic words" are repeated in his adversary's brief and oral argument and why the court asks the questions it does. In sum, if unreported opinions are cited, the uninitiated lawyer can remedy his deficiency; if they cannot be cited, he may not even know a deficiency exists.

C. Counterarguments

Two counterarguments can be advanced against the limited publication/no citation rules.¹⁵⁸ They do not attack the premises of the arguments for the rules but rather assert that the rules will effect a pernicious diminution in both judicial responsibility and judicial accountability.¹⁵⁹

157. Others have suggested that full citation be permitted. For example, the Advisory Committee on Procedure to the District of Columbia Circuit recommended that "[c]itation should be permitted of all unpublished opinions." 1977 PUBLICATION PLANS REPORT, *supra* note 34, app. D. A contrary result was reached, however, in a poll of Seventh Circuit attorneys. *Hearings, supra* note 1, at 465-70.

158. In addition to these counterarguments, constitutional challenges have also been advanced against the rules. The grounds for the attack are that the rules offend the due process and equal protection clauses and the first amendment. We have not discussed these arguments, because we do not find them terribly persuasive. They are vigorously set forth in *Unreported Decisions, supra* note 41, at 141-45, and Amicus Brief, *supra* note 128, at 45-55. The Supreme Court has had two opportunities to pass upon the constitutionality of the rules, but did not reach the question in either case. See note 74 *supra*.

159. Philosophical and legal literature provides numerous hymns to the benefits of published law.

In the preface to the first volume of his United States Reports, William Cranch made an argument for opinion publication worth quoting at length:

Much of that uncertainty of the law, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.

Many of the causes, which are the subject of litigation in our courts, arise upon circumstances peculiar to our situation and laws, and little information can be derived from English authorities, to lead to a correct decision.

Uniformity, in such cases, cannot be expected, where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court analogy of

1. *Judicial Responsibility.* The limited publication rules may interfere with responsible judicial decisionmaking by insulating a substantial portion of the court's product from the demands of stare decisis. Common-law courts have an obligation to avoid inconsistency by deciding like cases in a like manner.¹⁶⁰ This obligation is imposed to limit judicial discretion and ensure full consideration of all relevant arguments. Thus, a court faced with cases that appear to fall within the same controlling principle must treat those cases similarly or explain in reasoned fashion why it has not done so: either by overruling the prior case, by modifying or limiting its holding, or by distinguishing its facts.¹⁶¹

Handling precedent in this fashion requires care and effort. A judge who decides early in the process that a decision will not be published might not expend sufficient energy on the opinion to track down all the "like" cases. Some of these like cases will be unpublished and, in most circuits,¹⁶² not citable to the court. A judge, therefore, may not even know of the existence of such a case; or if he does know, he may feel no obligation to explain his departure from its holding.¹⁶³ A court might also use the cloak of non-publication to avoid the task of reconciling arguably inconsistent decisions. That reconciliation would require the court to elaborate a rule that would deprive it of the freedom to decide on the basis of "intuitive justice" rather than articulated doctrine.¹⁶⁴ While such license might be tempting to some appellate judges, it is not what we expect from them.

judgment cannot be maintained, if its adjudications are suffered to be forgotten . . .

In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps, nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed and the sources of litigation closed.

Publication of law, in general, has seemed so important to some scholars that they have included the concept as part of the definition of law:

Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation [*i.e.*, publication]. Wherefore promulgation is necessary for the law to obtain its force.

28 T. AQUINAS, *SUMMA THEOLOGICA* 15 (T. Gilby trans. & ed. 1966) (Question 90, Article 4).

160. See notes 136-41 and accompanying text *supra*.

161. This process is very important to legal consumers: it helps ensure the impartiality and fairness of the tribunal and focuses the court's attention on controlling doctrine. The certainty and predictability thus produced are valuable not only for the sake of justice but also because they reduce risks (and thus social costs) associated with decision making. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 426-27 (2d ed. 1977). Indeed, uncertainty as to controlling law may lead to more appeals being taken, increasing the workload of the courts of appeals. See Rubín, *Views From the Lower Court*, 23 U.C.L.A. L. Rev. 448, (1975). See generally Landes & Rosner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249 (1976).

162. See Table I, page 1207 *infra*.

163. See *United States v. Kinsley*, 518 F.2d 665, 670 n.10 (8th Cir. 1975), where the court expressly refused to explain why an unpublished opinion, relied on by the Government, was "plainly distinguishable."

164. See Rubín, *supra* note 161, at 451: "The ad hoc, 'railway ticket' decision—good only for this day and station—is a betrayal of the appellate function. Yet some appellate judges

A second judicial responsibility that may be undermined by limited publication is the obligation to develop and elaborate the law, both decisional and statutory. There is evidence that the list of unreported decisions at times includes opinions that break new ground.¹⁶⁵ Several factors work to produce this phenomenon. Even the best-intentioned and hardest-working court can make a mistake; it is sometimes difficult to appreciate the full significance of an opinion while writing it. Further, an opinion and the law discussed therein can change form as it is written. There is a danger, however, that such a metamorphosis will go unheeded if it occurs after the decision not to publish has been made. Finally, a court may use non-publication deliberately to suppress a lawmaking opinion.¹⁶⁶ Indeed, in some cases it is impossible to believe the court did not realize that it was creating law.¹⁶⁷ Why then a decision not to publish? Perhaps the court sought to avoid public disclosure, either because of uncertainty over the doctrine elaborated, or because it wished to decide the case at bar on an impermissible basis—by a rationale that will not necessarily be extended to all like cases.¹⁶⁸ The former reason is sometimes advanced as a proper ground for the Supreme Court to avoid decisions until the case has “percolated”¹⁶⁹ long enough for the Court to be reasonably sure of its decision. Whatever merit there may be in this position for the Supreme Court, it seems untenable for the circuit courts, whose appellate jurisdiction is non-discretionary.¹⁷⁰ The use of the non-publication rule to avoid resolution of difficult issues in effect transforms the courts of appeals into certiorari courts, a step hardly consistent with common understanding or congressional design.¹⁷¹

A final judicial obligation is the judge's responsibility to address his conscientious efforts to each case that he must decide.¹⁷² A judge's approach

favor this kind of opinion because it leaves them elbow room to maneuver in future cases.”

We suspect that a likely candidate for this treatment in unpublished cases is the summary judgment standard—especially in prisoner cases.

165. See notes 130-35 and accompanying text *supra*.

166. Some circuit rules provide for publication upon request by counsel. See Table I, page 1207 *infra*. It is doubtful that this procedure ameliorates the problem significantly. Most non-institutional litigants and their counsel simply have no interest in making the effort (and perhaps antagonizing the court) to see that it is done. And institutional litigants have no interest, of course, in requesting the publication of adverse decisions.

167. “Ducking” can also take the form of refusing to flesh out—in published opinions—general rules that are precedent.

168. A third possibility, limited to cases where there has been a dissent, is that a trade is made: the dissenter(s) will not reveal division on an issue if the majority will refrain from creating a precedent.

169. See, e.g., *Hearings, supra* note 1, at 705 (testimony of Judge Aldisert). Note that the Supreme Court will be denied the benefit of this percolation if circuit court opinions are not published.

170. See, e.g., 28 U.S.C. § 1291 (1976) (appeal from district courts).

171. Indeed, it is hard to see the difference between a denial of certiorari and a typical unpublished opinion that briefly states the posture of the case, refers to another opinion for authority, and then notes the disposition of the case at bar, for both are non-precedential, and contain no overt clue as to the court's thought processes. The connection is even closer when, as is often the case, the unpublished opinion is issued without argument by counsel.

172. Although not made directly in the context of non-publication, then-Circuit Judge Stevens' reminder of the importance of the individual litigant is worth repeating:

First, it is suggested that nothing more than the destiny of the litigant is involved on this appeal. But that is the nature of our adversary system; since the earliest days

to his work can easily become routine; heavy caseloads and dull, repetitive litigation encourage decision by superficial classification or pigeonholing. This tendency is exacerbated by the non-publication rules, because the rules to be fully effective require early determination that the case at bar is sufficiently routine—merely a dispute-settling case—to warrant non-publication. The very label “routine” and the accompanying lack of need to satisfy a critical audience likely result in the judge spending his time and effort on other matters.¹⁷³ Consequently, the premises that underlie the labeling of a case “routine” are rarely re-examined. In sum, the decision made early on controls the amount of time the judge spends on a case and thereby validates itself; a case given minimal attention, if not routine at the outset, is surely routine by the time the opinion is completed.¹⁷⁴

2. *Judicial Accountability.* The federal appellate courts wield vast power; their caseload affects crucial social issues. The checks on that power come from two principal sources: (1) the Supreme Court, which has the power to reverse or modify the decisions of the courts of appeals, and (2) legal consumers, *i.e.*, the bench, the bar, the scholars, and the public, each of which exercises a more subtle type of control. The limited publication/no-citation regimes significantly diminish the accountability of the circuit courts by rendering both types of control less effective.

a. *Review by the Supreme Court.* Formally, of course, the courts of appeals are accountable only to the Supreme Court. That Court, burdened

of the common law, judges have applied and molded rules to resolve controversies between particular litigants. Much of our law, with a special emphasis on its procedures, was evolved through the process of case-by-case adjudication.

United States v. Rosciano, 499 F.2d 173, 176 (7th Cir. 1974).

173. That real trade-offs exist here was not recognized by many who testified before the Hruska Commission. One exception was Judge Aldisert. See *Hearings, supra* note 1, at 708. See also *id.* at 555, 584 (testimony of Willard Lassers).

A dramatic example of this problem surfaced recently in the Supreme Court. In reviewing an unpublished decision of the Fourth Circuit, the Supreme Court found that the appellate court had filed an order that, “clearly . . . ha[d] nothing whatsoever to do with the petitioner’s case.” *Proctor v. Warden*, 435 U.S. 559, 560 (1978). The Fourth Circuit order had “disposed” of the case by mistaking plaintiff’s requested remedy, the court in which it was filed, and, apparently, the very name of the case. Indeed, the court seems to have confused two cases on appeal to it. See *id.* at n.* While the linkage between non-publication and assembly-line justice may be hard to establish conclusively, we suspect that in its routine preparation of opinions for publication the Fourth Circuit might have noticed this error.

174. The discussion has proceeded thus far upon the assumption that the judges themselves are making the early decision. In most circuits, that assumption is false. Nearly all circuits use staff attorneys or staff law clerks (as distinguished from personal law clerks) to help screen cases for full or summary appellate procedure. The screening decision inevitably coincides to a great extent with the publication decision. Thus in many circuits the decision on whether a case is given summary treatment and whether it merits a published opinion is made at least in part by staff attorneys. Furthermore, some of the circuits use central staff to draft “routine” opinions. See D. MEADOR, *APPELLATE COURTS* 231-39 (1974), for a general survey of the use of staff attorneys by the various circuit courts.

The point of this footnote is not to criticize staff attorneys or staff law clerks, but rather to suggest that an early decision made by one who is not directly and closely supervised by a particular judge is likely in many circuits to control the manner of disposition. Thus the use of staff attorneys may combine with the non-publication rules to produce a serious diminution in the responsibility that a judge bears for his decision. Judge Thompson of the California Court of Appeals has expressed similar concerns over the relation between professional staff and non-publication rules. Thompson, *Mitigating the Damages—One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476 (1975).

by its own heavy caseload, husbands its resources by choosing carefully the cases it will review. An unpublished opinion is less likely to be reviewed for several reasons. First, because an unpublished opinion (in most circuits) has no precedential value, the felt need to correct error in such an opinion is less than with published opinions. The Supreme Court is confronted merely with a wrong result, not with "bad law." It is not often that the Court will make room on its discretionary and highly crowded docket for a case that merely settles a dispute incorrectly,¹⁷⁶ that is, a case whose error is not likely to be perpetuated in future cases.

The no-citation rules also significantly diminish the possibility of review based upon a conflict among the circuits. The very notion of a conflict is theoretically attenuated; can it be said, for instance, that a conflict exists between two circuit courts that have come to opposite results on a single issue when each one insists that its determination is not precedential? Is that a conflict or merely a quirk? A more practical aspect of this problem is that an attorney seeking a writ of certiorari is unlikely to know of the unpublished law of other circuits and, therefore, will be unable to draw the Supreme Court's attention to the existence of a conflict.

Finally, unpublished opinions are typically not as thorough or elaborate as their reported cousins. This phenomenon affects the likelihood of Supreme Court review to the extent that less comprehensive and less thoughtful opinions make it more difficult for the Court to determine exactly what the lower court has done. Truncated, elliptical opinions do not draw the reviewer's attention as readily to the substantive issues of the cases. With so many petitions for certiorari to review, the Supreme Court will naturally show more interest in those cases in which systematic, published lower court opinions highlight the issues.¹⁷⁶

b. *Review by Legal Consumers.* The Supreme Court, of course, can review only a tiny fraction of the cases decided by the courts of appeals.¹⁷⁷ With review from above so unlikely, the real accountability of the courts of appeals is to the bench, the bar, the scholars, and the public. Unpublished opinions, especially ones that cannot be cited, will generally not receive critical commentary from those groups for the obvious reason that they will go unnoticed. A less obvious consideration is that there is relatively little incentive to comment upon an opinion that is not "law."

175. R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 172 (4th ed. 1969). A court of appeals that recognizes this may avoid review of its decisions by not publishing them. This potential problem was recognized by a judge of the California intermediate appellate court system. Kanner, *supra* note 134, at 445, n.74.

176. *But see* Taylor v. McKeithen, 407 U.S. 191, 194 (1972), in which the Court granted certiorari in a case where the Fifth Circuit's opinion consisted of one word. The Court remanded the case to obtain "the benefit of the insight of the Court of Appeals." For a more complete discussion of Taylor, see note 46 *supra*.

177. In the 1976 Term, for example, the Supreme Court, by written opinion, disposed of 111 cases from the inferior federal courts. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 299-301, table III (1977). During the 1975 fiscal year, the courts of appeals disposed of 10,125 appeals, 1976 PUBLICATION PLANS REPORT, *supra* note 34, at 3. Thus, no more than roughly one percent of those terminations were disposed of by the Supreme Court with written opinions.

Scholarly commentary can also serve as an effective check on the work of the circuit courts. The sifting of judicial opinions to isolate problems of inconsistency and superficial analysis is a useful part of our legal system: awareness of a knowledgeable audience—one that comments and criticizes—is helpful in keeping judges on their best behavior. Non-publication rules make scholarly evaluation difficult, since most commentators will simply be unaware of the existence or the content of the unpublished opinions. Thus, these opinions will often escape critical scrutiny.¹⁷⁸

Other important benefits of scholarship will also be diminished by the non-publication rules. Legal scholars pinpoint undiscovered issues and propose novel solutions to recurrent problems;¹⁷⁹ perhaps more important, they synthesize new ideas from apparently disparate fields.¹⁸⁰ These scholarly endeavors depend on the commentators' complete and ready access to all the efforts of the courts in an area; that access will be significantly curtailed by the non-publication rules.

A final form of accountability—perhaps the most important of all—comes from within. Judges feel an obligation to themselves, their colleagues, and their office to produce coherent legal work of high quality. Rules that rob an opinion of its precedential value considerably diminish this internal accountability. Karl Llewellyn, discussing the reasons why judges write opinions, made the point this way:

In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steady factor which aids reckonability.¹⁸¹

The limited publication/no-citation rules, in sum, are subject to the persuasive counterargument that they tend to leave some of the most powerful persons in the country accountable (with regard to at least part of their work) to no one—not even to themselves or to each other.

178. This point is forcefully made in Kanner, *supra* note 134, at 444-45.

179. Among the best known articles to do this is Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923). It was Professor Warren's article which Justice Brandeis cited as "the more recent research of a competent scholar" in *Eric R.R. Co. v. Tompkins*, 304 U.S. 64, 72 (1938). Justice Brandeis used the article to demonstrate that the accepted meaning of the term "laws" as used in the Rules of Decision Act was incorrect.

180. Perhaps the most famous example is Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The authors "reviewed a number of cases in which relief had been afforded on the basis of defamation, invasion of some property right, or breach of confidence or implied contract, and concluded that they were in reality based on a broader principle that was entitled to separate recognition." W. PROSSER, *THE LAW OF TORTS* 802 (4th ed. 1971).

181. K. LLEWELLYN, *THE COMMON LAW TRADITION* 26 (1960).

CONCLUSION

The case against the limited publication/no-citation rules is a strong one. The premises upon which the rules are based are subject to serious question, and powerful arguments can be advanced against the entire concept. It is not surprising, therefore, that a substantial number of critics have spoken against the system—critics from the bench, the bar, and the schools.¹⁸²

Furthermore, the widespread adoption of the limited publication/no-citation rules—a major change in the operation of the circuit courts¹⁸³—has been accomplished with relatively little public debate or legislative participation.¹⁸⁴ Certainly there is little reason to believe that non-publication has the enthusiastic support of wide majorities in any of the courts' constituencies. Given the opposition to the rules and the empirical, logical, and institutional problems they pose, the circuits would be well advised to proceed more cautiously.

Yet recognition of difficulties with the rules does not ameliorate the problems that led to their adoption. The heavy caseload of the courts of appeals will not disappear. While the flood could be attacked at its source through methods such as jurisdictional contractions, it is unlikely that the flow will diminish sufficiently to remove the problem.¹⁸⁵

The dilemma posed, then, is how to cope with steadily increasing caseloads without compromising the appellate process or undermining the virtues of stare decisis. The most appealing compromise we have seen is the system used in the Tenth Circuit. That court permits free citation of unpublished opinions, provided that a copy is served on opposing counsel. In addition, the court prepares a subject matter index of all unpublished opinions available to all at a modest fee. Copies of any unpublished opinions can be obtained from the clerk of the court.¹⁸⁶

This system seems to remedy many of the defects of the orthodox limited publication/no-citation rules. Judges are likely to feel more pressure to avoid inconsistent decisions and suppressed precedent since their unpublished opinions are available for use and subject to scrutiny.¹⁸⁷ The

182. In addition to the critics cited throughout notes 116-81 and accompany text *supra*, see P. CARRINGTON et al., *JUSTICE ON APPEAL* 35-41 (1976). Also, a majority of district court judges in the First Circuit voted in a "straw" poll vote to have all opinions published. 1977 PUBLICATION PLANS REPORT, *supra* note 34, app. D. It is not clear how this "straw poll" was conducted.

183. The percentage of published dispositions by the courts of appeals in written opinion decreased from 48.4% in 1973 to 37.2% in 1977. 1977 PUBLICATION PLANS REPORT, *supra* note 34, at 3.

184. There was, of course, some legislative and public participation in the form of the Hruska Commission hearings. See note 1 *supra*. Congress has not passed on the schemes, however, and it seems fair to say that the great part of the bar and the scholarly community knows literally nothing of them.

185. The metaphor is Judge Friendly's. See Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L.Q. 634 (1974).

Other compromises of the appellate process have also been suggested; for example, the curtailment of oral argument. See *Appellate Justice: 1975*, *supra* note 7, at 2-32.

186. See notes 85-86 and accompanying text *supra* for further explanation of the Tenth Circuit system.

187. See notes 158-74 and accompanying text *supra*.

unequal access problem¹⁸⁸ is substantially remedied by the subject matter index. Similarly, the court's work is available *and indexed* so that it is less insulated from critical evaluation by commentators.¹⁸⁹

Before endorsing the Tenth Circuit's plan too enthusiastically, however, more information concerning it is required. The system can be no better than the index; it would be helpful to know if the index is sufficiently detailed to inform legal consumers. Another question to be answered concerns the efficiency of the system. Does it result in the substantial time savings and increased productivity noted in some other circuits? Will a system that works in a court with the relatively modest caseload of the Tenth Circuit also work in considerably larger circuits such as the Ninth and the Fifth?¹⁹⁰

Here, as in any discussion of judicial reform, "caution" should be the watchword. As Professor Charles Wright noted a decade ago, "we should be wary of reforms that are attractive in terms of saving time but have unnoticed substantive effects."¹⁹¹ Our appellate system has virtues that have stood the test of time—virtues that may not be appreciated until they are lost through precipitous reform. It seems far better to strive for needed mechanical changes, such as widely urged jurisdictional restrictions and more judges with better support services, than to undertake organic reform that may substantially alter the character of appellate justice.

188. See notes 149-57 and accompanying text *supra*.

189. See notes 177-81 and accompanying text *supra*.

190. In 1977, the Tenth Circuit recorded 940 dispositions following argument or submission; the Ninth, 2,333; the Fifth, 2,221. 1977 PUBLICATION PLANS REPORT, *supra* 34.

191. Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A. J. 742, 747 (1966). See also *Hearings*, *supra* note 1, at 931 (testimony of Haworth).

TABLE I

PUBLICATION AND CITATION PROVISIONS

DISTRICT OF COLUMBIA

	FIRST	SECOND	THIRD	FOURTH	FIFTH	SIXTH	SEVENTH	EIGHTH	NINTH	TENTH
1. Provision for disposition without written opinion	Yes Rule 14	Yes Oral disposition in Open Court or Summary Order Rule 0.23	Yes Judgment Order Plan ¶ 5	No	Yes One word dispositions Rule 21	No	Yes Order Rule 35(c)(2)(ii)	Yes One word dispositions Rule 14	Yes Order Rule 21(a)	Yes One word dispositions Rule 17(b)
2. Presumption Against Publication	No	No	Yes (Per curiam Opinions) No (Signed Opinions)	Yes Implicit Rule 18(a)	No	Yes Implicit Plan ¶ 2	Yes Explicit Rule 35(a)	No	Yes Implicit Rule 21(a) & (b)	No
3. Decision on Publication	Majority of panel	Unanimous decision against publication required Rule 0.23	Majority of panel Plan ¶ 2	Author or majority of panel Rule 18(b)	Signed and per curiam opinions are all published Plan ¶ III	Majority of panel Plan ¶ 2	Majority of panel Rule 34(d)(1)	Majority of panel Plan ¶ 3	Majority of panel Rule 21(d)	Majority of panel Rule 17(c)
4. Right of Single Judge to publish separate opinion	Yes	Not applicable. See block above	No	No	Not applicable. See block above	No	Yes Rule 35(d)(2)	Yes Plan ¶ 3	Yes Rule 21(b)(6)	No
5. Procedure for request for Publication of unpublished opinions	No	No	No	No	No	No	Yes Rule 35(d)(3)	No	Yes Rule 21(f)	No
6. Citation Permitted	No Rule 8(f)	No Rule 0.23	No Rule addresses the question	No Rule citation disfavored but permitted. Opponent must be served.	No rule addresses the question	No Rule 11	No Rule 35(b)(2)(iv)	No Plan ¶ 3	No Rule 21(c)	Yes Opponent must be served with a copy Rule 17(c)

TABLE II

CRITERIA FOR DISPOSITION †
BY PUBLISHED OPINION

	D.C.	FIRST	SECOND	THIRD	FOURTH	FIFTH	SIXTH	SEVENTH	EIGHTH	NINTH	TENTH
1. Establishes a new rule of law or alters an existing rule.	X			X				X	X	X	X
2. Involves a legal issue of continuing public interest.	X			X				X	X	X	
3. Criticizes existing law.	X			X				X		X	
4. Creates or resolves a real or apparent conflict with published decisions.	X			X				X	X	X	X
5. Applies an established rule of law to new facts.	X								X		
6. Reverses a lower court published opinion.								X			
7. There exists a lower court published opinion.				X		X	X	X	X	X	X
8. Contributes to the legal literature.	X			X				X	X	X	
9. Calls attention to a rule of law which has been overlooked.											X
10. Has precedential value.				X		X	X				
11. Has institutional value.				X							
12. Courts or litigants will benefit from opportunity to read or cite it.				X							
13. Jurisprudential purpose.				X							
14. Is accompanied by a separate opinion which the author wants reported.											X

† Anyone who is familiar with the excellent works of Joseph Spaniol, Deputy Director of the Administrative Office of the Courts, will recognize these charts. They are modeled on charts that he has prepared in conjunction with his reports to the Judicial Conference of the United States.